

**In the Supreme Court of the United States**

OCTOBER TERM, 1987

PITTSTON COAL GROUP, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

ANN McLAUGHLIN, SECRETARY  
OF LABOR, ET AL., PETITIONERS

v.

JAMES SEBBEN, ET AL.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION  
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,  
PETITIONER

v.

CHARLIE BROYLES, ET AL.

ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURTS OF APPEALS  
FOR THE FOURTH AND EIGHTH CIRCUITS

BRIEF FOR THE FEDERAL PETITIONERS

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Supreme Court, U.S.

FILED

MAY 19 1988

JOSEPH F. SPANGLER, JR.  
CLERK

#### QUESTIONS PRESENTED

1. Whether Section 402(f)(2) of the Black Lung Benefits Act, which provides that the "criteria" applied to certain claims adjudicated by the Secretary of Labor "shall not be more restrictive" than the criteria applied by the Secretary of Health, Education, and Welfare (HEW) to claims filed during an earlier period, requires that, in addition to applying medical criteria no more restrictive than HEW's, the Department of Labor also must apply evidentiary rules and adjudicatory standards no more restrictive than HEW's.

2. Whether the Eighth Circuit erred in holding that a writ of mandamus should issue directing the Secretary of Labor to reopen thousands of claims for black lung benefits that had been finally denied before that court concluded that the Secretary had erroneously construed Section 402(f)(2).

### PARTIES TO THE PROCEEDING

In addition to James Sebben (whose actual name, Seddon, has been misspelled throughout this litigation), John Cossolotto, Bruno Lenzini, and Charles Tonelli, on behalf of themselves and all others similarly situated, brought suit in the United States District Court for the Southern District of Iowa; they are respondents in both No. 87-821 and No. 87-827. They named as defendants the Secretary of Labor (currently Ann McLaughlin, who replaced Dennis E. Whitfield, the Deputy Secretary of Labor, and William E. Brock, III, the former Secretary of Labor), the Department of Labor, and Steven Breeskin, Deputy Commissioner of the Department's Division of Coal Mine Workers' Compensation; the defendants are petitioners in No. 87-827. Pittston Coal Group, Barnes & Tucker Company, Island Creek Coal Company, Consolidation Coal Company, Old Republic Insurance Company, and Pennsylvania National Insurance Group intervened in the Eighth Circuit; they are petitioners in No. 87-821.

In addition to the petitioner, the Director of the Department of Labor's Office of Workers' Compensation Programs, and respondent Charlie Broyles, Lisa Kay Colley is a respondent in No. 87-1095.

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**BRIEF FOR THE FEDERAL PETITIONERS**

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**OPINIONS BELOW**

The opinion of the Eighth Circuit in *Sebben* (87-827  
Pet. App. 1a-18a) is reported at 815 F.2d 475. The opinion



of the United States District Court for the Southern District of Iowa (87-827 Pet. App. 19a-22a) is unreported.

The opinion of the Fourth Circuit in *Broyles* (87-1095 Pet. App. 1a-6a) is reported at 824 F.2d 327. The decisions of the Benefits Review Board (87-1095 Pet. App. 7a-9a (*Broyles*) and 18a-21a (*Colley*)) are unreported, as are the decisions of the administrative law judges (87-1095 Pet. App. 10a-17a (*Broyles*) and 22a-28a (*Colley*)).

### JURISDICTION

The judgment of the Eighth Circuit in *Sebben* was entered on March 25, 1987. The order denying the Secretary's petition for rehearing was entered on June 25, 1987 (87-827 Pet. App. 23a). The order denying the intervenors' petition for rehearing was entered on July 24, 1987 (87-821 Pet. App. 18a). On September 17, 1987, Justice Blackmun extended the time for filing petitions for a writ of certiorari to and including November 20, 1987. Both the Secretary's and the intervenors' petitions were filed on that date. This Court granted the petitions and consolidated them on February 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the Fourth Circuit in *Broyles* was entered on July 31, 1987. A petition for rehearing was denied on September 30, 1987 (87-1095 Pet. App. 29a-30a). The petition for a writ of certiorari was filed on December 29, 1987. The Court granted the petition and consolidated it with Nos. 87-821 and 87-827 on April 4, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), HEW's "interim" regulation, 20 C.F.R.

410.490, and Labor's "interim" regulation, 20 C.F.R. 727.203, are reprinted in the appendix to this brief (App., *infra*, 1a-8a).

### STATEMENT

1. *Statutory and regulatory framework.* Under the Black Lung Benefits Act,<sup>1</sup> 30 U.S.C. (& Supp. III) 901 *et seq.*, "[d]isability benefits are payable to a miner if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, No. 86-327 (Dec. 14, 1987), slip op. 5.<sup>2</sup> Claims for benefits are adjudicated under two programs, depending on the date the claim was filed. Claims filed before July 1, 1973,

<sup>1</sup> Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792, was amended by and became known as the Black Lung Benefits Act in 1972. See Pub. L. No. 92-303, 86 Stat. 150, 30 U.S.C. (& Supp. III) 901 *et seq.* It subsequently was amended by the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11, the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1643, the Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, 95 Stat. 1635, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a) and (d), 100 Stat. 312, 313.

<sup>2</sup> Pneumoconiosis is a lung disease caused by exposure to various types of dust, such as coal mine dust and asbestos. See Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W. Va. L. Rev. 677, 679 & n.13 (1983). When caused by coal mine dust, it is known as black lung disease. The statute (30 U.S.C. 902(b)) and the regulations (20 C.F.R. 410.401(b), 727.202, 718.201) include in the definition of "pneumoconiosis" not only the description of the disease but also a requirement that it be caused by coal mine employment. For clarity, we will use "pneumoconiosis" to refer solely to the disease, treating the question of causation as distinct, as did this Court in *Mullins Coal Co.*

under Part B of the Act, were considered by the Department of Health, Education, and Welfare (HEW), and benefits were paid from the general revenues of the United States. 30 U.S.C. 922(a), 924. Claims filed after that date, and adjudicated under Part C of the Act, are considered by the Department of Labor (30 U.S.C. 902(c)) and individual coal mine operators bear primary responsibility for paying benefits (30 U.S.C. 932(b)).<sup>3</sup>

a. *HEW's regulations.* From its 1969 enactment until its 1978 amendment, the Black Lung Benefits Act provided that "the term 'total disability' has the meaning given it by regulations of the Secretary of Health, Education, and Welfare." See 30 U.S.C. (1976 ed.) 902(f). After HEW defined "total disability" as the inability to engage in any substantial gainful activity (see 20 C.F.R. 410.402(b) (1971)), Congress in 1972 provided that a miner should be considered totally disabled whenever he is unable to perform work comparable to his usual coal mine work. 30 U.S.C. 902(f)(1)(A). Congress at that time also liberalized the coverage of the program in several other respects.<sup>4</sup> HEW thereafter promulgated an amended set of regulations, known as its "permanent" regulations, which

<sup>3</sup> In certain cases, the Black Lung Disability Trust Fund, which the coal mining industry finances through an excise tax on coal and the Director of the Office of Workers' Compensation Programs administers, pays Part C benefits. See 30 U.S.C. 932(j), 934; 26 U.S.C. 4121(a), 9501.

<sup>4</sup> Among other changes, Congress directed that benefits should not be denied solely on the basis of a negative X-ray. 30 U.S.C. 923(b). It further provided that a miner should be presumed to be entitled to benefits, despite an X-ray that was negative for complicated pneumoconiosis, if he had worked in coal mines for 15 years and other medical evidence demonstrated that the miner had a totally disabling pulmonary impairment. 30 U.S.C. 921(c)(4). Congress repealed that presumption in 1981. Pub. L. 97-119, § 202(b)(1), 95 Stat. 1643.

governed the Part C program as well as the Part B program. Under those regulations, ventilatory and blood-gas studies and evidence of certain heart abnormalities could justify a finding of total disability. 20 C.F.R. 410.424, 410.426(b) & Subpt. D App.<sup>5</sup> In addition to proving that they were totally disabled, claimants also had to establish that they had pneumoconiosis and that their disability arose out of their coal mine employment.

In 1972, at the same time that it promulgated its permanent regulations, HEW promulgated an "interim" regulation applicable only to Part B claims. 20 C.F.R. 410.490(b). The interim regulation was HEW's response to congressional concern about an existing backlog of claims and the unavailability of medical testing facilities to evaluate claimants. *Mullins Coal Co.*, slip op. 16-17; 20 C.F.R. 410.490(a). It provided a rebuttable presumption that a claimant was totally disabled due to pneumoconiosis where he (a) presented X-ray, biopsy, or autopsy evidence establishing the existence of pneumoconiosis (20 C.F.R. 410.490(b)(1)(i)) or, in the case of one employed as a miner for at least ten years,<sup>6</sup> presented ventilatory study scores showing impairment (20 C.F.R. 410.490(b)(1)(ii)),

<sup>5</sup> Ventilatory studies, which measure the ability of the lungs to move air in and out, may establish the presence of a respiratory or pulmonary disease that may or may not be pneumoconiosis. Blood-gas studies demonstrate the presence of an impairment in the transfer of oxygen from the lungs to the blood. See *Mullins Coal Co.*, slip op. 5; Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 737-743 (1981).

<sup>6</sup> HEW's interim regulation is somewhat unclear as to how long a claimant had to work in coal mines to establish the interim presumption by means of ventilatory studies. In one part it requires 15 years of coal mine employment (20 C.F.R. 410.490(b)(1)(ii)), but later apparently requires only ten years of coal mine employment (20 C.F.R. 410.490(b)(3)).



and (b) demonstrated that the impairment arose out of coal mine employment (20 C.F.R. 410.490(b)(2)). The ventilatory study scores in the interim regulation required claimants to show a much less severe degree of impairment than was required under HEW's permanent regulations. Compare 20 C.F.R. 410.490(b)(1)(ii) with 410.426(b). With respect to causation, while claimants presenting ventilatory study scores, but not X-ray evidence, could establish the presumption only if they had worked in coal mines for ten years, it was presumed that their pneumoconiosis arose out of coal mining (20 C.F.R. 410.490(b)(3)). Claimants presenting X-ray, biopsy, or autopsy evidence of pneumoconiosis would be presumed to have shown causation if they had worked in coal mines for ten years. 20 C.F.R. 410.416, 410.456, 410.490(b)(2). Claimants presenting X-ray, biopsy, or autopsy evidence who had not worked in coal mines for ten years could also establish the presumption by proving causation in other ways (*ibid.*).<sup>7</sup>

The interim regulation specifically provided that, if the presumption was invoked, it could be rebutted by evidence that the miner was doing work comparable to his or her usual coal mine work or was able to do so. 20 C.F.R. 410.490(c). If a miner failed to invoke the presumption, he

<sup>7</sup> While the regulation did not specifically address how a miner with fewer than ten years of work in coal mines could prove that his pneumoconiosis arose from coal mine employment, a claimant could establish causation by showing that exposure to lung irritants other than coal mine dust was not the likely cause of his pneumoconiosis. HEW required claimants with five to nine years of coal mine employment to show that they had fewer than ten years of work in another job involving exposure to dust hazards. Claimants with fewer than five years of coal mine employment had to show that the disease arose within five years of that employment. See *Report of the Comptroller General of the United States, Examination of Allegations Concerning Administration of the Black Lung Benefits Program* 3 (1976).

nevertheless could establish that he qualified for benefits under HEW's permanent regulations. 20 C.F.R. 410.490(e).<sup>8</sup>

b. *Labor's regulations.* Prior to 1978, the Department of Labor, in adjudicating Part C claims, applied HEW's permanent regulations (see 20 C.F.R. 718.2 (1976)), but not its interim presumption, which by its terms applied only to Part B claims (20 C.F.R. 410.490(b)). By amendments enacted in 1978, Congress gave the Secretary of Labor authority to issue regulations defining "total disability" under the Part C program by directing the Secretary to "establish criteria for all appropriate medical tests \* \* \* which accurately reflect total disability in coal miners." Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(c), 92 Stat. 95; 30 U.S.C. 902(f)(1)(D). In addition, Congress instructed the Secretary to reopen claims that had been denied before the effective date of the 1978 amendments. 30 U.S.C. 945. It provided in Section 402(f)(2), 30 U.S.C. 902(f)(2), that, in adjudicating the reopened claims and claims filed before the promulgation of final Labor Department regulations, the "[c]riteria applied by the Secretary of Labor \* \* \* shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." Thus, Labor was to apply "criteria" no more restrictive than those applied by HEW, including the criteria in its interim regulation, to claims filed before it promulgated final regulations, which were promulgated on April 1, 1980.

<sup>8</sup> For example, a claimant who worked fewer than ten years in coal mines and did not have X-ray evidence of lung damage, but did have a ventilatory study score showing a significant pulmonary disability, would not qualify under HEW's interim presumption, but might qualify under HEW's permanent regulations. See 20 C.F.R. 410.414, 410.426(b).



The Secretary of Labor promulgated interim regulations in 1978 to govern the claims Congress ordered reopened and those filed before final regulations were promulgated. The regulations included an "interim presumption" of total disability from pneumoconiosis arising from coal mine employment—and thus of entitlement to benefits—applicable in circumstances that are similar, but not identical, to those set out in HEW's interim regulation. 20 C.F.R. 727.203. It provides, like HEW's interim regulation, that claimants may utilize X-ray, biopsy, or autopsy evidence or ventilatory studies satisfying medical criteria identical to those in HEW's interim regulation to establish the presumption. 20 C.F.R. 727.203(a)(1) and (2). It goes beyond HEW's regulation in allowing the presumption to be triggered by blood-gas studies, by other medical evidence including a physician's opinion, and, in the case of a deceased miner and in the absence of relevant medical evidence, by the affidavit of a survivor. 20 C.F.R. 727.203(a)(3)-(5). At the same time, however, the presumption of entitlement could be established under Labor's interim regulation only by claimants who worked in coal mines for at least ten years. 20 C.F.R. 727.203(a)(1). Thus, claimants who worked in coal mines for fewer than ten years and presented X-ray evidence showing pneumoconiosis could not, as under HEW's interim regulation, gain the benefit of the presumption of entitlement by relying on other evidence to show causation. In that event, they could not trigger the presumption at all.<sup>9</sup>

<sup>9</sup> Miners with fewer than ten years' experience in coal mines could, however, qualify for benefits by proving, apart from any presumption, that they were totally disabled as a result of pneumoconiosis arising out of coal mine employment. The Benefits Review Board does not apply the rules HEW applied in cases involving miners with fewer than ten years' experience (see note 7, *supra*), but instead has held

Like HEW's interim regulation, Labor's interim regulation provided that the presumption could be rebutted by proof that a claimant was doing or was capable of doing his usual coal mine work or work comparable to it. 20 C.F.R. 727.203(b)(1) and (2). Labor's interim regulation also provided that the presumption could be rebutted by proof that a claimant's disability did not arise in whole or in part out of coal mine employment or that the miner did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).<sup>10</sup> Labor's interim regulation also provided that anyone failing to qualify for the presumption of eligibility could seek to establish eligibility under Labor's final regulations (20 C.F.R. 727.203(d)), which are set forth at 20 C.F.R. Pt. 718. Claims filed after April 1, 1980, are adjudicated under those final regulations, which do not contain a presumption of entitlement comparable to HEW's interim presumption or Labor's interim presumption.

## 2. *The merits issue.* Charlie Broyles and Bill Colley

that competent medical advice is sufficient to prove causation regardless of how many years a claimant worked in coal mines in cases where multiple causes are possible. See *Collura v. Director, Office of Workers' Compensation Programs*, 6 B.L.R. 1-100, 1-103 (1983), *aff'd in part*, petition dismissed without published opinion, 738 F.2d 421 (3d Cir. 1984). It is also the position of the Director of the Office of Workers' Compensation Programs that lay testimony is sufficient to prove causation from coal mine employment in cases where the evidence does not suggest other causes of the disease.

<sup>10</sup> Labor construed its interim presumption to shift the burden of persuasion, not merely the burden of production. *Mullins Coal Co.*, slip op. 7 n.12. It is not clear whether HEW's interim regulation shifted the burden of persuasion. Other presumptions in the Black Lung Benefits Act have been construed as shifting only the burden of production. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 27 (1976); *Prokes v. Mathews*, 559 F.2d 1057, 1060 (6th Cir. 1977); but see *Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1514-1515 (11th Cir. 1984).

filed claims for black lung benefits under the Part C program before Labor's final regulations took effect in 1980. Both submitted X-rays showing the presence of pneumoconiosis. Because neither had ten years of coal mine employment, neither could invoke the presumption of entitlement under Labor's interim regulation.

An administrative law judge determined that Broyles had worked for five years as a coal miner from 1946 to 1952, after which he worked over 20 years at other occupations involving exposure to dust (87-1095 Pet. App. 11a-12a). Although the administrative law judge found it unclear which occupation had caused Broyles' pneumoconiosis, he gave Broyles "the benefit of the doubt" and concluded that coal mining had caused it (*id.* at 16a). The administrative law judge also assumed that Broyles, who retired in 1976 following coronary bypass surgery (*id.* at 14a-15a), was totally disabled. However, relying on physicians' reports, the administrative law judge denied Broyles' claim because his disability was not due to pneumoconiosis, but instead was caused by his heart condition (*id.* at 16a). The Benefits Review Board affirmed (*id.* at 7a-9a).

The administrative law judge determined that Colley, who had arthritis, chronic bronchitis, and had suffered a stroke in 1978 (87-1095 Pet. App. 26a, 27a), had worked in coal mines for no more than nine and a half years between 1945 and 1962 (*id.* at 24a-25a). The administrative law judge found it "questionable" whether the X-ray Colley had submitted showed that he had pneumoconiosis (*id.* at 25a), but denied the claim on the basis of physicians' reports supporting the conclusion that Colley's pulmonary condition was not causally related to his prior coal mine employment (*id.* at 28a). The Benefits Review Board affirmed (*id.* at 18a-21a).

The Fourth Circuit consolidated the two cases.<sup>11</sup> It re-

<sup>11</sup> Lisa Kay Colley was substituted as claimant for her father, who died prior to the court of appeals' decision.

versed on the ground that in each case the administrative law judge "erred in failing to evaluate the claims under [HEW's interim regulation], 20 C.F.R. § 410.490" (87-1095 Pet. App. 2a). Relying on *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983), and *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985), the court concluded that Labor's interim presumption regulation is contrary to Section 402(f)(2)'s directive that the Secretary apply "criteria" that are not more restrictive than the criteria applied by HEW in its interim regulation (87-1095 Pet. App. 5a).<sup>12</sup> The court found Labor's interim regulation inconsistent with the statute because, under HEW's interim regulation but not under Labor's interim regulation, claimants such as Broyles and Colley, who submitted X-rays showing pneumoconiosis, could invoke the presumption of entitlement to benefits even if they had worked in coal mines for fewer than ten years. It rejected the Secretary's argument that Congress intended in Section 402(f)(2) that the Department of Labor should apply *medical* criteria no more restrictive than those applied by HEW to claims filed before Labor's permanent regulations were in place, but that Congress did not intend to require Labor to apply the same evidentiary standards and adjudicatory rules applied by HEW (87-1095 Pet. App. 5a).<sup>13</sup> The court remanded for reevaluation of Broyles' and Colley's claims (*id.* at 6a).

<sup>12</sup> In a divided opinion in *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (1987), petition for cert. pending, No. 87-1045, the Sixth Circuit also followed *Halon* and *Coughlan*.

<sup>13</sup> In so concluding, the Fourth Circuit did not refer to the decision of the Seventh Circuit in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 400 (1987), which expressly rejected the holdings in *Halon* and *Coughlan*. The Seventh Circuit



3. *The procedural issue.* The Eighth Circuit's decision in *Sebben* involves a mandamus action by four named plaintiffs on behalf of a putative class of unsuccessful claimants. The putative class members, like Broyles and Colley, had submitted X-rays showing the presence of pneumoconiosis but were denied the presumption of entitlement to benefits under Labor's interim regulation because they had not worked in coal mines for ten years (87-827 Pet. App. 18a).<sup>14</sup> The claims of some of the members of the putative class were denied before the 1978 amendments were enacted, reopened in light of the 1978 amendments, and again denied. Others filed claims after the 1978 amendments took effect but before the Secretary's final regulations were promulgated in 1980. The putative class members either failed to exhaust their administrative remedies or failed to seek judicial review of the final administrative denial of benefits. The plaintiffs sought to compel the Secretary of Labor to reopen the claims of the class members and reconsider them under the standard set forth in *Coughlan*. The district court denied the application for a writ of mandamus without certifying a class (87-827 Pet. App. 19a-22a).

The Eighth Circuit reversed (87-827 Pet. App. 1a-18a). It acknowledged that mandamus is warranted only where

found "criteria," as used in Section 402(f)(2), ambiguous, noting that the final sentence of the immediately preceding subsection specifically refers to " 'criteria for all appropriate medical tests \* \* \* which accurately reflect total disability in coal miners' " (817 F.2d at 401 (citation omitted)). Given the ambiguity, the court examined the legislative history of the provision and concluded that the Department's interpretation is consistent with the intent of Congress (*id.* at 402-404). Judge Weis, dissenting in *Halon*, had reached the same conclusion.

<sup>14</sup> The class is limited to those who submitted X-ray evidence, and does not include those seeking to trigger the presumption by relying on autopsy or biopsy evidence. 87-827 Pet. App. 18a.

there has been a " 'patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review' " and the agency had "a clear nondiscretionary duty to act" (*id.* at 4a (quoting *Nader v. Volpe*, 466 F.2d 261, 265-266 (D.C. Cir. 1972))). With respect to members of the putative class whose claims had been reopened and denied after the 1978 amendments, the court held that the Secretary has a duty to reopen them again because "[e]ven if review of those claims did occur, the Secretary did not do so under the proper standard" (87-827 Pet. App. 12a). As to claimants whose claims were first denied after the 1978 amendments, the court held that the Secretary "owes the same duty to these claimants to reopen and consider their claims" (*id.* at 12a-13a).

The Eighth Circuit rejected the argument that it should not order the claims reopened because the claimants had failed to exhaust their administrative remedies or seek review in a court of appeals in timely fashion. Without citation to any explicit legislative decision to relax the statutory deadlines, the court noted that "Congress had the authority to waive the limitation created by the deadlines" (87-827 Pet. App. 15a). With respect to those claims that had been reopened after the 1978 amendments and denied again, the court concluded that, in ordering reopening in 1978, "Congress, by implication, waived the thirty and sixty-day deadlines for appeals" (*id.* at 15a) and concluded that "[t]he Secretary has yet to take properly 'into account' the 1977 amendments" (*id.* at 16a). As to the later-filed claims, the court concluded that "[i]t would \* \* \* be contrary to congressional intent to allow" those claims to be treated differently (*ibid.*). Furthermore, the court stated, the 30-day and 60-day deadlines "become largely unmeaningful for actions based on jurisdictional grants outside of" the Black Lung Benefits Act, such as the



mandamus statute (*id.* at 17a). It remanded the case for certification of a class whose claims the Secretary would have to reopen (*id.* at 2a n.1, 18a).

#### SUMMARY OF ARGUMENT

I. The Secretary of Labor reasonably concluded that Congress in Section 402(f)(2) mandated the application of medical criteria no more restrictive than those in HEW's interim regulation, but did not require the Department of Labor to apply other aspects of HEW's interim regulation. Section 402(f)(2)'s requirement that Labor apply no more restrictive "criteria" is set forth as part of the definition of "total disability," and while medical evidence is plainly relevant to that issue, a miner's years of service bear primarily on the question of causation. The structure of the statute therefore suggests that the term "criteria" as used in defining "total disability" means medical criteria only, and it was reasonable to conclude that miners with fewer than ten years of coal mine experience could be denied the opportunity to invoke a presumption of entitlement to benefits.

The legislative history also supports this conclusion. It shows that the language of Section 402(f)(2) was proposed in response to testimony that the ventilatory study scores applied by Labor in adjudicating Part C claims required a greater degree of impairment than was required under Part B and that, as a result, the approval rate was much lower under the Part C program. The House reports make clear that it intended to require Labor to apply *medical* criteria no more restrictive than those applied by HEW. The Senate, apparently more impressed than the House by testimony that the discrepancy in approval rates between the Part B and Part C programs was due to the unwarranted laxness of the ventilatory study scores in

HEW's interim regulation, passed a bill giving the Secretary of Labor authority to promulgate new medical criteria. The Conference Committee incorporated both approaches. In Section 402(f)(1)(D), following the Senate approach, it provided that the Secretary of Labor was to "establish [new] criteria for all appropriate medical tests." In Section 402(f)(2), which immediately follows Section 402(f)(1)(D), it adopted the House approach pending promulgation of these new criteria by providing that Labor was to apply "criteria" no more restrictive than those in HEW's interim regulation to claims filed before the final regulations were promulgated. In light of this history of the enactment of the language of Section 402(f)(2), the Secretary reasonably construed the word "criteria" to be shorthand for the phrase "criteria for all appropriate medical tests" in the preceding sentence.

Moreover, it is especially unlikely that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience since the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease. The Conference Report stated that all regulatory presumptions were to include the statutory presumption that pneumoconiosis resulted from coal mine employment where a miner had worked ten years in coal mines, and that is what Labor's interim regulation provided. Furthermore, the House Committee approved Labor's interim regulation after reviewing it and noting that the interim presumption could be established only by miners with ten years' experience.

In light of the statutory language and its legislative history, the Secretary's construction of the term "criteria" in Section 402(f)(2) is more plausible than that adopted by the Fourth Circuit. The Secretary's construction is at least a permissible construction, so the Fourth Circuit erred by failing to defer to it.

II. Assuming that the Secretary's construction of Section 402(f)(2) is erroneous, the Eighth Circuit nevertheless erred in holding that a writ of mandamus should issue ordering the reopening of claims that had been finally denied. Mandamus is warranted only where the defendant owes the plaintiff a clear nondiscretionary duty. Mandamus is not warranted where the interpretation of a statute is a prerequisite to the establishment of the duty that is said to be owed, because, in such a case, no *clear* duty is owed, and Section 402(f)(2) does not plainly require the construction respondents favor. In any event, the Secretary has no duty to reopen the claims of the members of the putative class. The 1978 amendments required the reopening of certain claims, but those claims were reopened; the amendments did not require any further reopening.

Mandamus is also unavailable because members of the putative class failed to appeal adverse decisions, and exhaustion of statutory remedies is a prerequisite to mandamus relief. Application of that rule is particularly sensible here because, if members of the putative class had raised their challenge to Section 402(f)(2) and pursued it administratively, cases where the construction of the statute might have made a difference would have been identified. In addition, the Eighth Circuit's reopening order flouts the statutory appeal deadlines.

The fact that members of the putative class failed to challenge the denials of their claims in timely fashion also leads to the conclusion that their claims are barred by res judicata. Where, as here, the administrative proceeding has the essential characteristics of a judicial proceeding and the plaintiffs could have advanced a legal argument in the administrative proceeding, they should be barred from raising the claim in a subsequent proceeding. Any other rule fails to establish repose and leads to costly repetitive litigation, as this case illustrates.

## ARGUMENT

### I. THE DEPARTMENT OF LABOR REASONABLY CONSTRUED SECTION 402(f)(2) TO REQUIRE THAT THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART C CLAIMS NOT BE MORE RESTRICTIVE THAN THE MEDICAL CRITERIA APPLIED IN ADJUDICATING PART B CLAIMS

#### A. *The Structure and Context Of The Statute Support The Secretary's Construction*

Although Section 402(f)(2) requires the Secretary of Labor to apply "criteria" no more restrictive than those applied by HEW to claims filed before the final regulations were promulgated, Congress did not define the term "criteria," and the proper definition cannot be discerned from the word alone.<sup>15</sup> The Secretary's construction—that Congress intended Labor to apply medical criteria no more restrictive than those in HEW's interim regulation to

<sup>15</sup> "Criteria" is defined as "a standard on which a judgment or decision may be based" (*Webster's New Collegiate Dictionary* 307 (1983)) and its meaning varies according to what is to be judged or decided. The Sixth Circuit in *Kyle*, which held that Labor's interpretation is contrary to the statute, nevertheless conceded that "[m]anifestly, the term 'criteria' is subject to numerous possible interpretations" (819 F.2d at 142). Similarly, in *Strike*, the Seventh Circuit, which upheld the Secretary of Labor's interim regulation, stated that the "meaning of the statute is ambiguous" (817 F.2d at 401).

Representative Simon stated with respect to Section 402(f)(2) that "the language in this bill is crystal clear." 124 Cong. Rec. 3431 (1978). While Representative Simon's conclusion that the language enacted is clear beyond dispute has surely not received uniform acceptance, it is noteworthy that he thought it clear that under Section 402(f)(2) "[t]he Department of Labor is required to apply *medical* criteria no more restrictive than criteria" applied under HEW's interim regulation (*ibid.* (emphasis added)).



such claims, but did not require Labor to allow claimants with fewer than ten years' coal mine experience to establish a presumption of entitlement to benefits—is strongly supported by the structure and context of the statute.

The “no more restrictive criteria” requirement appears in Section 402(f), which is the provision of the Black Lung Benefits Act that defines “total disability.” Medical evidence, like vocational evidence, is relevant to the question whether a miner is totally disabled, since the Act defines total disability as the inability to perform coal mine work or work requiring comparable abilities (Section 402(f)(1)(A)). But evidence as to how long a claimant worked in coal mines has only the most indirect bearing on the issue of total disability, as distinct from whether a claimant's pneumoconiosis arose from coal mine employment. Congress, in amending the definition of “total disability” to require the application of criteria no more restrictive than those employed under HEW's interim regulation, cannot without justification be assumed to have referred to criteria whose main relevance is to the separate issue of causation. If Congress had intended to require Labor to apply HEW's interim regulation in its entirety, it presumably would have amended the statutory presumption provision, 30 U.S.C. 921(c)(4), to mandate the use of that provision. The fact that it instead modified the definition of “total disability” supports the conclusion that it was referring to medical criteria by which that disability is to be judged, and not to adjudicatory and evidentiary rules bearing on how the pneumoconiosis came about.

B. *The Legislative History Of Section 402(f)(2) Supports The Conclusion That “Criteria” Means Medical Criteria And Not Evidentiary And Adjudicatory Rules*

1. Congress's purpose in amending Section 402(f) in 1978 further supports the Secretary's conclusion that Congress meant “criteria” in Section 402(f)(2) to mean medical criteria and not to include adjudicatory and evidentiary rules.<sup>16</sup> The members of the House of Representatives who favored the 1978 amendment ultimately adopted as Section 402(f)(2) were particularly concerned that the ventilatory study scores applicable to Part C claims under HEW's permanent regulations (20 C.F.R. 410.426(b)) were much stricter than the scores applicable to Part B claims under HEW's interim regulation (20 C.F.R. 410.490(b)(1)(ii)). The amendment had its genesis in 1974, after the 1972 amendments had taken effect, when the House held hearings and a representative of the United Mine Workers complained that the approval rate for claims filed under the Part C program was much lower than the approval rate for claims filed under the Part B program. *Black Lung Amendments of 1973: Hearings on H.R. 3476 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 351 [hereinafter *1974 Hearings*] (statement of Bedford W. Bird). The Mine Workers' representative ex-

<sup>16</sup> This Court, in footnote 31 of the *Mullins Coal Co.* opinion (slip op. 22), appeared to assume that the adjudicatory and evidentiary rules in Labor's interim regulation could be no more restrictive than those in HEW's interim regulation. Neither that assumption, which was not necessary to the decision there, nor the Court's statement that Labor's interim regulation “satisfies Congress' demand that Labor's criteria ‘shall not be more restrictive than the criteria applicable’ ” under HEW's interim presumption (slip op. 18), should be viewed as controlling this case, where the issue is actually presented.



plained that the low approval rate under the Part C program was the result of the fact that the "ventilatory test scores [in HEW's permanent regulations] are only minimally different from the scores used to evaluate permanent disability under the Social Security disability program" (*id.* at 353). He recommended that Congress enact "an explicit provision extending the so-called 'interim' *medical* criteria" (*ibid.* (emphasis added)). The Director of the Appalachian Research and Defense Fund, a legal services group that represents miners, agreed that "[t]he ventilatory study standards are what makes [*sic*] the difference" (*id.* at 398 (statement of John Rosenberg)). The Department of Labor's representative, who was criticized by some members of the committee because the medical standards applied in determining whether a miner was disabled were stricter under Part C than Part B (see 1974 *Hearings* 329 (statement of Chairman Perkins) and 399 (statement of Rep. Dent)), noted that "we are only talking about one standard[,] the ventilatory [standard]." *Id.* at 398 (statement of Nancy Synder).

The House responded with bills amending the definition of total disability to require HEW to adjudicate Part C claims under standards no more restrictive than those applied to Part B claims. See H.R. 3333, 94th Cong., 1st Sess. § 3 (1975); H.R. 2913, 94th Cong., 1st Sess. § 3 (1975); H.R. 10760, 94th Cong. 1st Sess. § 7(a) (1975). The committee report to one of those bills explained that such a requirement was necessary because "the Department of Health, Education, and Welfare, exercising authority provided under the current law, has literally saddled the Department of Labor with rigid and difficult *medical* standards for measuring claimant eligibility under part C of the program. The so-called 'permanent' *medical* standards now in effect under part C are much more demanding than

the so-called 'interim' standards applied by HEW under part B of the program." H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975) (emphasis added). The report stated that the House bill "would require that standards no more restrictive than the 'interim' *medical* standards shall be equally applicable to part C claims" (*id.* at 15 (emphasis added)). These explanatory comments are identical to the comments that accompanied the version of the bill initially passed by the House. See H.R. Rep. 95-151, 95th Cong. 1st Sess. 14 (1977).<sup>17</sup>

Like the House, the Senate focused on the fact that HEW's interim ventilatory study scores "are far less stringent" than the scores in its permanent regulation. S. Rep. 95-209, 95th Cong., 1st Sess. 13 (1977). However, it ultimately determined not to require continued application of HEW's interim medical criteria. The Senate Report noted HEW's assertions "that the interim standards do not accurately determine actual disability, that they were used under part B only to clear away the backlog of claims arising from the 1972 amendments, and that the permanent standards more accurately identify disabling respiratory and pulmonary functions in coal miners" (*ibid.*). The report also noted that the United Mine Workers considered even HEW's interim ventilatory study scores too stringent (*ibid.*). The Senate concluded that it was "not qualified to assess the appropriateness of medical test standards to be used to determine disability in coal miners" (*ibid.*) and the bill it passed gave the Secretary of Labor authority to define the term "total disability" without reference to previously applied criteria (*id.* at 34-35).

<sup>17</sup> That version of the bill would have amended Section 402(f) simply by providing that "[w]ith respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973" (H.R. Rep. 95-151, *supra*, at 52).

The Conference Committee reconciled the differing approaches of the House and Senate bills by adopting the Senate approach on a permanent basis and the House approach pending promulgation of Labor's regulations. H.R. Conf. Rep. 95-864, 95th Cong., 2d Sess. 16 (1978). Congress resolved the controversy over whether the ventilatory study scores used to adjudicate Part C claims were too strict or those used to adjudicate Part B claims were too lax by directing the Secretary of Labor in Section 402(f)(1)(D) to consult with the Director of the National Institute for Occupational Safety and Health and "establish *criteria for all appropriate medical tests* \* \* \* which accurately reflect total disability in coal miners" (emphasis added)). The statute's next section, Section 402(f)(2), directed the Secretary of Labor to use the "criteria" in HEW's interim regulation in adjudicating claims filed before Labor's final regulations took effect. In light of that placement and the history of the amendment, the Secretary of Labor reasonably concluded that "criteria" in Section 402(f)(2) is shorthand for the phrase used in the preceding sentence, "criteria for all appropriate medical tests." See *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 401 (7th Cir.1987).<sup>18</sup>

<sup>18</sup> The Sixth Circuit suggested in *Kyle* that Congress's choice of the phrase "criteria for all appropriate medical tests" in Section 402(f)(1)(D) and only "criteria" in Section 402(f)(2) shows that it intended "criteria" in the latter section to have a broader meaning (819 F.2d at 143). However, nothing in the legislative history supports such a conclusion. To the contrary, the fact that the House, which drafted the language that became Section 402(f)(2), focused on the difference between the ventilatory study scores used under Part B and Part C during the 1974 Hearings and repeatedly referred to *medical* criteria in its reports (H.R. Rep. 94-770, 94th Cong., 1st Sess. 13-14 (1975); H.R. Rep. 95-151, 95th Cong., 1st Sess. 15 (1977)) indicates that the criteria referred to in Section 402(f)(2) are medical criteria.

2. Congress therefore gave substantial attention to the problem of the medical standards to be used in determining whether a claimant was totally disabled. There is, on the other hand, no evidence in the language of the statute or its legislative history indicating that Congress intended to require the use of the adjudicatory and evidentiary rules of HEW's interim regulation until Labor's final regulations were promulgated. In particular, there is no evidence that Congress intended to preserve the ability of miners with fewer than ten years' experience to establish the presumption of entitlement to black lung benefits contained in HEW's interim regulation. To the contrary, as the Seventh Circuit noted in *Strike* (817 F.2d at 403-404 (emphasis added)): "The only reference to the use of presumptions in the conference report stated that '[t]he conferees also intend that *all* standards are to incorporate the presumptions contained in section 411(c) of the Act [30 U.S.C. § 921(c)].' H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 \* \* \*. That Section creates a rebuttable presumption that pneumoconiosis arose out of coal mine employment '[i]f a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines.' 30 U.S.C. § 921(c)(1)." It is precisely that requirement of ten years' coal mining experience that was "expressly incorporate[d]" (817 F.2d at 404) into the Secretary of Labor's interim regulation.

Moreover, the summary of medical knowledge on coal worker's pneumoconiosis appended to the final House report concluded that there was broad agreement that "[t]he probability that coal miners will develop black lung increases regularly after about ten years of working underground." H.R. Rep. 95-151, *supra*, at 30. It added that the



study "with the most carefully selected samples of miners" showed that " '[t]here was little pneumoconiosis until miners had worked at least eleven years in the mines' " (*ibid.* (citation omitted)). In view of that recognition by the House, it would be surprising if Congress simultaneously acted to mandate the use of a presumption of entitlement to black lung benefits for miners with fewer than ten years' experience.<sup>19</sup>

Furthermore, post-enactment legislative history demonstrates that the Congress that adopted Section 402(f)(2) was not concerned with the adjudicatory and evidentiary rules used by HEW. Shortly after the 1978 amendments were enacted, the members of the House Committee reviewed and commented on Labor's interim regulation before it was adopted in final form. See *Strike*, 817 F.2d at 404; *Halon*, 713 F.2d at 30 (Weis, J., dissenting). The committee stated that it "strongly supports the

<sup>19</sup> The Sixth Circuit in *Kyle*, like most of the other courts that have held that Labor's interim regulation is inconsistent with Section 402(f)(2), relied on the assertion that the "general purpose" of the 1978 amendments "appears to have been to liberalize the standards under which black lung benefits were being awarded at the time" (819 F.2d at 142). That statement is not entirely accurate and certainly does not compel the conclusion that Congress intended to provide a presumption of entitlement to benefits to miners with fewer than ten years of coal mine experience. Congress heard evidence both that HEW's permanent ventilatory study standards were too strict and that HEW's interim ventilatory study standards were too lax. It ultimately responded by instructing Labor to devise new medical standards, which is not a liberalizing of the standards. In the interim, it instructed Labor to apply HEW's interim ventilatory study standards, which did have a liberalizing effect. But that does not indicate that Congress intended to mandate that miners with fewer than ten years' experience be allowed to establish a presumption of entitlement to benefits, and it is improbable that it so intended in light of the evidence before it that those miners were unlikely to suffer from black lung disease.

re-promulgation of the interim standards, as found in Section 727.203(a)" (87-821 Pet. App. 44a). It expressly recognized that ten years of coal mine employment was required to invoke the presumption in that section (*id.* at 46a) and never hinted that that requirement violated the statute. These comments are entitled to considerable weight since they reflect the contemporaneous view of the authors of the legislation. *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-527, 533-534 (1982); *Talley v. Mathews*, 550 F.2d 911, 920 (4th Cir. 1977)). They further confirm the correctness of Labor's interpretation. See *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984).

Finally, it has been contended that Labor's interim regulation is also invalid in that it authorizes rebuttal by two methods not explicitly set forth in HEW's interim regulation, which explicitly allows rebuttal only on the ground that the claimant is doing or is capable of doing his usual coal mine work. 20 C.F.R. 410.490(c). See page 9, *supra*. This issue is pending in the Sixth Circuit in *Youghiogheny & Ohio Coal Co. v. Miliken*, No. 88-3213, and *Grant v. Director, Office of Workers' Compensation Programs*, No. 87-3674; see also *Sulyma v. Director, Office of Workers' Compensation Programs*, 827 F.2d 922, 924 (3d Cir. 1987).<sup>20</sup> If HEW's interim regulation really confines rebuttal evidence to that which it specifically authorizes, and if Section 402(f)(2) requires Labor to apply the adjudicatory and evidentiary rules embodied in HEW's interim regulation, Labor's inclusion of additional rebuttal methods does, indeed, make its regulation "more restrictive" than HEW's and thus is contrary to the

<sup>20</sup> The issue was raised but not decided in *Consolidation Coal Co. v. Smith*, 837 F.2d 321 (8th Cir. 1988).



statute.<sup>21</sup> We submit that Congress could not have intended such a result, and that this fact gives further support to the Secretary's interpretation of the statute.

Specifically, such an argument suggests that Labor's interim regulation is invalid insofar as 20 C.F.R. 727.203(b)(3) and (4) authorize rebuttal by showing that the claimant's disability did not arise out of coal mine employment or is not due to pneumoconiosis. However, Congress enacted the Black Lung Benefits Act to provide benefits to a coal miner "if (a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment" (*Mullins Coal Co.*, slip op. 5). To deny coal mine operators the ability to prove that a claimant does not have pneumoconiosis or that his disability did not arise out of coal mine employment would therefore appear to be irrational and perhaps even suspect on due process grounds. Cf. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 34-37 (1976) (construing Section 411(c)(4) not to limit the evidence a coal mine operator may present on

<sup>21</sup> The Department of Labor does not think that the rebuttal methods set out in HEW's interim regulation were meant to be exhaustive. See 43 Fed. Reg. 36826 (1978). The Benefits Review Board, however, thinks that HEW's interim regulation did not allow for rebuttal by proof that the claimant did not have pneumoconiosis or the claimant's disability did not arise out of coal mine employment. *Whiteman v. Boyle Land & Fuel Coal Co.*, No. 87-348 BLA (May 2, 1988), slip op. 3. At the same time, though, the Board believes that HEW's interim regulation cannot be applied to Part C claims because coal mine operators were not given the opportunity to comment on it as required by the Administrative Procedure Act and that the additional rebuttal methods in Labor's regulation should be applied (*id.* at 3-4).

rebuttal, thus avoiding a constitutional challenge); *Mullins Coal Co.*, slip op. 22 n. 32. It would also appear to be contrary to the statutory command that "all relevant evidence shall be considered." 30 U.S.C. 923(b); *Mullins Coal Co.*, slip op. 13. To avoid these problems, it is sensible to construe the reference to "criteria" in Section 402(f)(2) as encompassing medical standards, but not adjudicatory or evidentiary rules.<sup>22</sup>

### C. *The Secretary's Interpretation Of Section 402(f)(2) Is Entitled To Deference*

The Department of Labor's construction of "criteria" in Section 402(f)(2) as referring to medical criteria, but excluding evidentiary and adjudicatory rules is more consistent with the language of the statute and its legislative history than the alternative interpretation the Fourth Circuit adopted. In addition, Labor's interpretation in its 1978 regulation of a term added in the 1978 amendments represents "a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (citation omitted); see also *Morrison-Knudsen Construction Co. v. Director, Office of*

<sup>22</sup> The Sixth Circuit, while holding in *Kyle* that Labor's interim regulation is contrary to Section 402(f)(2) because it does not allow claimants with fewer than ten years of coal mine work to invoke the presumption of total disability, suggested that Labor's interim regulation is not inconsistent with the statute insofar as it authorizes additional rebuttal methods. 819 F.2d at 144; see also *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 258 n.1 (6th Cir. 1988); *Prater v. Hite Preparation Co.*, 829 F.2d 1363, 1366 n.2 (6th Cir. 1987); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 490 (6th Cir. 1985). The court did not explain why it was permissible for Labor's interim regulation to be more restrictive in authorizing additional rebuttal methods.

*Workers' Compensation Programs*, 461 U.S. 624, 635 (1983). And where " 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *NLRB v. United Food Workers Union, Local 23*, No. 86-594 (Dec. 14, 1987), slip op. 10 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Since Labor's contemporaneous construction of Section 402(f)(2) is reasonable, that construction is entitled to deference.

## II. THE EIGHTH CIRCUIT ERRED IN ORDERING THE REOPENING OF FINAL, DENIED CLAIMS

If this Court holds that the Secretary of Labor permissibly construed Section 402(f)(2), then the Eighth Circuit plainly erred by ordering the reopening of the putative class members' claims. However, as explained below, assuming arguendo that Labor erroneously interpreted Section 402(f)(2), the Eighth Circuit nevertheless erred in ordering the reopening of thousands of claims that had been finally denied. And that error, if uncorrected, will have serious consequences on the system by which black lung claims are presently resolved. As explained in our petition for a writ of certiorari (87-827 Pet. 10-12), approximately 94,000 claims, most of which were finally denied more than six years ago, will have to be reopened if the Eighth Circuit's decision is affirmed and a nationwide class is certified. Since administrative law judges currently issue about 10,000 decisions each year in black lung cases, such a massive reopening effort would very likely create a significant backlog in a system that is already severely backlogged. See *Delays in Processing and Adjudicating Black Lung Claims: Hearing Before a Subcomm. of the*

*House Comm. on Government Operations*, 99th Cong., 1st Sess. (1985) [hereinafter *1985 Hearing*]; *Report to the Honorable Donald J. Pease, House of Representatives, by the General Accounting Office, Adjudication of Black Lung Claims by Labor's Office of Administrative Law Judges and Benefits Review Board* (1984) (reprinted in the *1985 Hearing* 37).

### A. Mandamus Relief Is Unavailable Because Members Of The Putative Class Were Owed No Clear Nondiscretionary Duty And Failed To Exhaust Their Statutory Remedies

1. "This Court repeatedly has observed that mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, No. 86-1529 (Mar. 22, 1988), slip op. 17-18, citing *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). As codified at 28 U.S.C. 1361,<sup>23</sup> mandamus is warranted "only if the defendant owes [the plaintiff] a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). See also *Gulfstream Aerospace*, slip op. 18; *Kerr*, 426 U.S. at 403. The Secretary of Labor did not breach any clear nondiscretionary duty owed to members of the putative class.

The Department of Labor followed the directive of Section 402(f)(2) and considered (in some cases, reconsidered), under its interim regulation, claims filed before the final regulations were promulgated. The Eighth Circuit found a breach of a clear duty because it concluded that the interim regulation conflicted with the statute. But, even assuming that the interim regulation is inconsistent

<sup>23</sup> Section 1361 provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."



with Section 402(f)(2), mandamus is not warranted because where the existence of a duty "depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930). Otherwise stated, "the mandamus remedy is only available 'under exceptional circumstances of clear illegality. When the performance of official duty calls for a construction of governing law, the [federal] officer's interpretation will not be disturbed by a writ of mandamus unless it is clearly wrong and his official action is arbitrary and capricious.'" *Homewood Professional Care Center, Ltd. v. Heckler*, 764 F.2d 1242, 1251 (7th Cir. 1985) (emphasis in original) (quoting *Americana Healthcare Corp. v. Schweiker*, 688 F.2d 1072, 1084 (7th Cir. 1982), cert. denied, 459 U.S. 1202 (1983)). See also *Maczko v. Joyce*, 814 F.2d 308, 310 (6th Cir. 1987) ("when a duty is disputed or subject to various interpretations \* \* \* the duty is not 'owed' in that the obligation to do a particular act cannot be said to be clear, peremptory, defined or ministerial"), cert. denied, No. 86-2020 (Oct. 5, 1987). In light of the conflict in the circuits on the merits issue (and the dissenting opinions in two of the cases where the courts held that the Secretary's interim regulation conflicts with the statute), it can hardly be argued that the Secretary's construction is so clearly wrong as to warrant mandamus.

Respondents attempt to avoid the "clear illegality" requirement by suggesting that it no longer applies when a court of appeals must construe a statute to decide whether a clear legal duty exists.<sup>24</sup> Under their theory, a court may

<sup>24</sup> The putative class respondents dismiss decisions such as this Court's decision in *Wilbur* as "old cases." 87-821 Br. in Opp. 21.

construe a statute the interpretation of which is in doubt and, if it concludes that the statute, as construed, creates a duty, then such a duty clearly exists. See, e.g., *Government of Virgin Islands v. Douglas*, 812 F.2d 822, 832 n.10 (3d Cir. 1987); *13th Regional Corp. v. United States Dep't of Interior*, 654 F.2d 758, 760 (D.C. Cir. 1980). We submit that mandamus cannot be so justified. Even if it could, however, such a theory would not be applicable here because nothing in the statute compels the Secretary to reopen their claims now. To support the action it took, the Eighth Circuit not only had to conclude (wrongly in our view) that the statute plainly means what respondents say it means, but also that the statute plainly requires the Secretary to reopen (and, in some cases, re-reopen) claims that had been finally denied. The statute directed the Secretary to reopen some claims, and they were reopened. Nothing in the statute requires the Secretary to reopen those claims again, or to reopen the other claims that were first denied under Labor's interim regulation, and the Secretary accordingly has no duty, much less a clear non-discretionary duty, to do so.

2. In addition, mandamus "is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief." *Heckler v. Ringer*, 466 U.S. at 616. Mandamus is plainly unwarranted here because members of the putative class failed to exhaust the statutory remedies that were open to them and, if pursued, might have provided the relief they seek.

The Black Lung Benefits Act, which incorporates adjudicatory provisions of the Longshore and Harbor Workers' Compensation Act (see 30 U.S.C. (& Supp. III) 932(a)), provides a comprehensive review scheme that allows a claimant a full opportunity to contest the validity of regulations such as the interim presumption at issue here. Claims for benefits are presented to a deputy com-



missioner in the Department of Labor's Office of Workers' Compensation Programs, who is responsible for developing evidence, notifying responsible coal mine operators of potential liability, defining contested issues, and making an initial determination on eligibility. See 20 C.F.R. 725.351(a), 725.410-725.422. Any party who disagrees with the deputy commissioner's proposed resolution of the issues may obtain a hearing before an administrative law judge (ALJ) by requesting one within 30 days of the deputy's decision. 20 C.F.R. 725.419. After the ALJ rules, any party may seek review of that decision by the Benefits Review Board (20 C.F.R. 725.481), which "fulfill[s] the review function previously performed by district courts" (*Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1118 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985)), by filing a petition for review within 30 days of the ALJ's decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(a)); 20 C.F.R. 725.479. The Board has asserted, with court approval, that it has authority to invalidate regulations that it finds inconsistent with the Black Lung Benefits Act. *Gibas*; *Carozza v. United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984); *McCluskey v. Zeigler Coal Co.*, 2 B.L.R. 1-1248 (Ben. Rev. Bd. 1981).<sup>25</sup>

<sup>25</sup> In fact, whether Labor's interim regulation complies with Section 402(f)(2) was first raised, sua sponte, by Board member Miller, in *Lynn v. Director, Office of Workers' Compensation Programs*, 3 B.L.R. 1-125, 1-128 (1981). The Board did not decide the issue in *Lynn* (*id.* at 1-126 n.1) or in *Halon* (see 713 F.2d at 31), the first court of appeals decision on the issue, because it had not been timely raised in either case. After *Halon*, the Board found the regulation consistent with the statute, but followed *Halon* in claims arising in the Third Circuit. See *Reilly v. Director, Office of Workers' Compensation Programs*, 7 B.L.R. 1-139, 1-144 (1984). Because the issue was unsettled before the Board until 1984, and because administrative law judges follow the Board where it disagrees with Labor Department regula-

Any party may petition the appropriate court of appeals for review of the Board's decision for legal error within 60 days. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921(c)); 20 C.F.R. 725.482.

The members of the putative class have in common a failure to timely pursue the remedies statutorily available to them to challenge the denial of their claims. Some failed to challenge adverse decisions by a deputy commissioner, others failed to seek review of an adverse ALJ decision, and others failed to appeal adverse Benefits Review Board decisions to the court of appeals. See 87-827 Pet. App. 4a-5a. There is no question that the relief they now seek could have been ordered, had they pursued their claims. The claimants in *Halon*, *Coughlan*, *Kyle*, and *Broyles* obtained that relief, and the putative class respondents have suggested no reason why they failed to pursue their claims. Accordingly, there is no reason why the requirement for mandamus relief that a plaintiff "exhaust[] all other avenues of relief" (*Heckler v. Ringer*, 466 U.S. at 616) should be waived.<sup>26</sup>

There are substantial practical reasons for requiring exhaustion of the statutory remedies. See generally *McKart*

tions, respondents err in claiming (87-821 Br. in Opp. 16) that raising the issue would have forced members of the putative class, all of whom filed claims before April 1, 1980, through a "clearly futile pursuit of the entire administrative process and an appeal to a court of appeals."

<sup>26</sup> The putative class respondents state (87-821 Br. in Opp. 19) that "the Secretary had denied claimants a right that could not, in principle, be vindicated if those claimants were required to pursue the administrative process on an individual basis." That is flatly wrong. If they had appealed and prevailed on the argument that the Secretary's interim regulation is contrary to Section 402(f)(2), and they qualified for the presumption of entitlement under HEW's interim regulation, they would have obtained the benefit of that presumption, which is

v. *United States*, 395 U.S. 185, 193-195 (1969). If putative class members had challenged Labor's construction of Section 402(f)(2) in a timely manner, the agency could have addressed it in individual cases and at least identified those cases where the interpretation of Section 402(f)(2) made a difference in the outcome. As matters now stand, it is not possible to determine which claimants might have been adversely affected by Labor's construction. Moreover, the Eighth Circuit's decision eviscerates the deadlines established for appealing denials of black lung benefits claims, which have been held to be jurisdictional. See, e.g., *Bolling v. Director, Office of Workers' Compensation Programs*, 823 F.2d 165 (6th Cir. 1987); *Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506 (4th Cir. 1986); and cases cited at 87-827 Pet. App. 17a n.13. Indeed, the court of appeals acknowledged that, in its view, those deadlines were "largely unmeaningful" (*id.* at 17a).

#### B. *Reconsideration Of The Claims Is Barred By Res Judicata*

In addition to being barred from seeking mandamus relief because they failed to pursue the avenue of relief available to them under the Black Lung Benefits Act, the

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what they now seek. The cases respondents cite in support of their claim that exhaustion should be excused, such as *Nader v. Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972) (district court may "preserve a substantial right from irretrievable subversion in an administrative proceeding"), are therefore not relevant to their claim. Moreover, as the Eighth Circuit noted (87-827 Pet. App. 4a), Labor has been applying adverse court of appeals decisions in cases pending in the relevant circuit on the date of the decision, so, after the first claimant in a circuit prevailed on the merits issue, no other claimant was required to continue to pursue it. And, in light of respondents' suggestion that it is unreasonable to expect claimants to retain counsel (87-821 Br. in Opp. 17), it should be noted that the Act requires responsible operators or the Black Lung Disability Trust Fund to pay prevailing claimants' attorneys' fees. See 20 C.F.R. 725.362, 725.367.

putative class members are barred from attempting to relitigate their claims now by res judicata, because they failed to challenge the denials of their claims within the time limits Congress established. It is well settled that a final judgment of a court on the merits of an action "precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Relitigation is barred even if the final, unappealed judgment was "wrong or rested on a legal principle subsequently overruled in another case" (*ibid.*). Similarly, under Section 83 of the Restatement (Second) of Judgments (1982), "a valid and final [administrative] adjudicative determination has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

This Court has held that the unreviewed factfindings of state and federal administrative agencies are entitled to preclusive effect. *University of Tennessee v. Elliott*, No. 85-588 (July 7, 1986), slip op. 10; *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966). The Court has also stated more broadly that res judicata would bar the relitigation of a "claim" that was the subject of an administrative determination. *Commissioner v. Sunnen*, 333 U.S. 591, 598 (1948). Although this Court has not held that an unreviewed administrative judgment bars a party from litigating a legal issue that could have been raised but was not in the administrative action or on appeal (see 4 K. Davis, *Administrative Law Treatise* 49 (1983)), it has recognized the principle set forth in the Restatement of Judgments that the preclusive effect of an administrative decision is largely determined by whether the administrative forum has " 'the essential procedural characteristics of a court.' " *University of Tennessee*, slip op. 9 n.6 (quoting comments to Section 83 of the Restatement (Second) of Judgments).



The Restatement rule that parties are precluded from bringing actions raising legal issues that they could have raised in a prior administrative proceeding where the administrative proceeding had the essential characteristics of a judicial proceeding should be applied here. It is clear that black lung benefits claims are adjudicated in adversarial, court-like proceedings. Claimants (and operators) have the right to counsel (20 C.F.R. 725.362), may develop evidence and engage in discovery (20 C.F.R. 725.450-725.457), and receive written decisions with findings of fact and conclusions of law (20 C.F.R. 725.418(b), 725.477(b)). Review by the Benefits Review Board and then by a court of appeals is available after an ALJ decision. 30 U.S.C. (& Supp. III) 932(a) (incorporating 33 U.S.C. 921)). As noted (page 32, *supra*), the Board considers itself free to hold that Labor Department regulations conflict with the statute and, of course, a court of appeals has authority to reverse a benefit decision on the basis that the standards applied in the administrative proceeding were contrary to those required by the statute. If a party fails to seek timely review of a decision by a deputy commissioner, an administrative law judge, or the Benefits Review Board, the unreviewed decision becomes final.<sup>27</sup>

<sup>27</sup> Decisions are subject to modification only where there is "a change in conditions or a mistake in a determination of fact" and a request for modification is made within one year of the final decision. See 30 U.S.C. (& Supp. III) 932(a); 33 U.S.C. (& Supp. III) 922; 20 C.F.R. 725.310. This modification provision is not a basis for refusing to apply res judicata any more than the possibility of reopening district court judgments for various reasons under Fed. R. Civ. P. 60(b) is a reason for refusing to give judicial decisions preclusive effect. See *Downs v. Director, Office of Workers' Compensation Pro-*

Barring the putative class members from reviving their claims also makes sense. Res judicata "is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts." *Federated Department Stores*, 452 U.S. at 401 (citations omitted). Res judicata establishes "certainty in legal relations" (*Sunnen*, 333 U.S. at 597). There is no repose if courts are able to order the reopening of closed cases any time they believe an administrative adjudicator has misconstrued a directive in the governing statute.<sup>28</sup>

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*grams*, 803 F.2d 193, 199 n.13 (5th Cir. 1986) (res judicata applies despite modification possibilities).

Subsequent claims for black lung benefits may be entertained where "the deputy commissioner determines that there has been a material change in conditions." 20 C.F.R. 725.309(d). That exception is necessary because pneumoconiosis is a progressive disease, so that a claimant who is not totally disabled when he first applies for benefits may subsequently become totally disabled as a result of black lung disease even if he was not exposed to coal dust in the interim. See *Lopatto, supra*, 85 W. Va. L. Rev. at 680. That exception is plainly not a valid basis for denying preclusive effect to administrative decisions in situations where the predicate for reconsideration—a material change in conditions—is not satisfied.

<sup>28</sup> The Eighth Circuit suggested that Congress intended to waive the failure on the part of the members of the putative class to exhaust their administrative remedies or seek judicial review in timely fashion (87-827 Pet. App. 15a-17a). But, while Congress did in fact waive the deadlines in the case of claimants who had been denied benefits prior to the 1978 amendments by ordering that their claims be reopened, those claims were reopened and reconsidered. The court of appeals plainly erred in concluding that it could order further reopening. Nothing in the statute suggests that Congress intended to abolish the deadlines it had established, so that claims are permanently subject to reopening by the courts.



In addition, the interests *res judicata* serves in "avoiding the cost and vexation of repetitive litigation" (*University of Tennessee*, slip op. 9) especially support its application here. The costs of reopening thousands of claims would be significant. Since the claims of putative class members were denied at least three years ago, and many of them long before that, it would be difficult to retrieve their files and locate members of the putative class. In addition, members of Congress and the Department of Labor viewed the backlog in adjudicating black lung benefits claims as unacceptable when pending claims numbered about 21,000 before administrative law judges and 5,687 before the Benefits Review Board. 1985 Hearing, 10 (statement of Sen. Rockefeller); 34 (statement of Rep. Rahall); 126-127 (Statement of Nahum Litt, Chief of the Department of Labor's Office of Administrative Law Judges). The result of this backlog was a delay of three and one-half to seven years for claimants to receive decisions on their claims (*id.* at 10 (statement of Sen. Rockefeller)). It takes little imagination to perceive the drastic impact of the Eighth Circuit's decision, which could require the reexamination of 94,000 claims. Cf. *Morrison-Knudsen Construction Co. v. Director, Office of Workers' Compensation Programs*, 461 U.S. 624, 636-637 (1983) (interpreting Longshore and Harbor Workers' Compensation Act to permit significant increase in number of the challenges in administrative process would undermine the statutory goal of providing prompt compensation to injured workers and their survivors.<sup>29</sup>

<sup>29</sup> It would also be difficult for individual coal mine operators or the industry-financed Black Lung Disability Trust Fund, which at the end of February 1988 was over \$2.9 billion in debt to the United States Treasury, to gather evidence to meet these stale claims. The individual operators and their insurers could not reasonably have anticipated

The putative class members are not situated differently from the respondents in *Federated Department Stores* in any significant manner. In that case, several parties filed actions in federal district court, which were all dismissed. Some of the parties appealed, while others did not. While the appealed cases were pending, an intervening decision made clear that the district court had erroneously dismissed the actions and the appealed cases were accordingly remanded. The nonappealing parties then refiled essentially identical actions in order to obtain the benefit of the intervening decision, but this Court held that *res judicata* barred their claims. The putative class members, like the respondents in *Federated Department Stores*, failed to appeal earlier adjudications and this suit is their attempt to obtain the benefit of the favorable intervening decisions of the courts of appeals other than the Seventh Circuit. Like the nonappealing parties in *Federated Department Stores*, their attempt should be barred by *res judicata*.<sup>30</sup>

that thousands of previously-denied claims would be ordered reopened. Nor could Congress, in setting the rate of tax on coal to finance the debt-ridden trust fund (26 U.S.C. 4121(a), 9501), have anticipated the Eighth Circuit's decision.

<sup>30</sup> The Eighth Circuit cited (87-827 Pet. App. 16a) *Bowen v. City of New York*, 476 U.S. 467 (1986), in support of its conclusion that reopening is not barred because the claims had been finally denied. That case does not support the Eighth Circuit's decision to order reopening. First, the time limits under the Black Lung Benefits Act have been construed to be jurisdictional and do not allow for extensions of time as does the provision of the Social Security Act (42 U.S.C. 405(g)) at issue in *Bowen v. City of New York*. See 33 U.S.C. 921(c) (incorporated by 30 U.S.C. (& Supp. III) 932(a)). Second, this Court's reasoning in that case supports the conclusion that reopening is *not* appropriate here. The Court recognized that "exhaustion is the rule in the vast majority of cases" (*id.* at 486). It concluded that tolling of statutes of limitations is warranted "in the rare case such as this" (476 U.S. at 481) where an "unrevealed policy" was implemented (*id.* at 485). There was, of course, no secret policy here; the Secretary's interim regulations have been published in the Code of Federal Regulations since they were promulgated in 1978.

## CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

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MAY 1988

## APPENDIX

A. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. 902(f), provides:

(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that —

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for

(1a)

Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

B. HEW's interim regulation, 20 C.F.R. 410.490, provides:

*Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.*

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.



(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than –	
	FEV <sub>1</sub>	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

C. Labor's interim regulation, 20 C.F.R. 727.203, provides:

*Interim presumption.*

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a) (2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV <sub>1</sub>	MVV
67" or less	2.3	92
68"	2.4	96
69"	2.4	96
70"	2.5	100
71"	2.6	104
72"	2.6	104
73" or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO <sub>2</sub>	Arterial pCO <sub>2</sub> equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.



**RESPONDENT'S**

**BRIEF**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1988

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Nos. 87-821 and 87-827

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PITTSTON COAL GROUP, *et al.*,  
v. *Petitioners,*

JAMES SEBBEN, *et al.*,  
*Respondents.*

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ANN McLAUGHLIN, SECRETARY OF LABOR, *et al.*,  
v. *Petitioners,*

JAMES SEBBEN, *et al.*,  
*Respondents.*

---

On Writs of Certiorari to the United States  
Court of Appeals for the Eighth Circuit

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**BRIEF FOR RESPONDENTS**

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**STATEMENT**

This case involves the rights of those former coal miners who (1) filed for benefits under the Black Lung Benefits Act on or before March 31, 1980, and (2) worked in coal mines for less than ten years. Under regulations promulgated by the Secretary of Labor ("the Secretary"), the fact that these claimants lacked ten years of mine exposure meant that they could not invoke the "interim presumption" of disability contained in 20 C.F.R. § 727.203. Instead, they were required to prove their eligibility under the far more onerous "permanent" standards. See 20 C.F.R. §§ 410.401-476.<sup>1</sup>

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<sup>1</sup> See note 23 *infra*.

Respondents contend that the denial of the benefit of the interim presumption to this group of claimants was inconsistent with the plain terms of the Black Lung Benefits Reform Act of 1977 ("the 1977 Amendments"), codified in 30 U.S.C. § 902(f) (2).

This basic claim arises in different ways in the two cases consolidated here. No. 87-1095, *Director, Office of Workers' Compensation Programs v. Broyles*, involves two miners who pursued administrative and judicial appeals from the initial denials of their claims, and won a ruling below directing the Secretary to apply the interim presumption in their cases. The instant case, by contrast, involves a proposed class of miners whose individual claims are not still pending. They seek to enforce a separate statutory right also created by the 1977 Amendments—the right to have the files of all pending or denied claims reviewed by the Secretary under revised criteria incorporating the interim presumption of disability. See 30 U.S.C. § 945(b).<sup>2</sup> Although the Secretary went through the motions of conducting such reviews, those reviews were largely meaningless for the class of claimants who lacked ten years of mine exposure and thus were categorically excluded from the scope of the interim presumption. These claimants thus never received the key benefit mandated by Congress in section 945(b). Moreover, as we demonstrate here, their right to enforce this mandate was not forfeited when they failed to pursue administrative appeals by which they might ultimately have obtained benefits.

<sup>2</sup> The class, as proposed and approved below, also included claimants who filed for benefits after the effective date of the 1977 Amendments and prior to April 1, 1980, when the Secretary's obligation to apply the interim presumption to new claims lapsed by virtue of the final promulgation of new permanent standards. See U.S. Pet. App. 18a. See also 30 U.S.C. § 902(f)(2)(C). As discussed in note 85 *infra*, this "subclass" was not covered by the automatic review process mandated in section 945(b).

The Black Lung Benefits Act provides benefits to former coal miners who are "totally disabled" due to "pneumoconiosis."<sup>3</sup> "Pneumoconiosis," in turn, includes the condition that is commonly known as "black lung,"<sup>4</sup> as well as other respiratory impairments "arising out of coal mine employment."<sup>5</sup> See *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 108 S. Ct. 427, 431 (1987). As described in petitioners' briefs, the federal benefits program, created in 1969, has two parts. Part B, administered by the Secretary of Health, Education and Welfare through the Social Security Administration (SSA), provided benefits to claimants who filed prior to the end of June 1973.<sup>6</sup> Part C, administered by the Secretary of Labor, applies to subsequent claims. Depending on the circumstances, Part C benefits are paid either by the federal Black Lung Disability Trust Fund or by individual coal-mine operators. For the large majority of claims at issue here, the federal fund would be responsible to pay any benefits.<sup>7</sup>

The events leading up to the present controversy began in 1972, when Congress recognized that many Part B

<sup>3</sup> 30 U.S.C. § 921(a); 20 C.F.R. § 718.1.

<sup>4</sup> "Pneumoconiosis" as a medical term refers to the formation of nodular lesions caused by inhalation of many different types of dust. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 6 n.2 (1976). The statutory use of the term is both broader (because it includes other types of respiratory conditions) and narrower (because it applies only to conditions arising out of coal-mine employment).

<sup>5</sup> 30 U.S.C. § 902(b).

<sup>6</sup> The original deadline had been December 31, 1972, but it was extended in 1972. Congress also enacted special transitional provisions covering claims filed in the second half of 1973. See 30 U.S.C. § 925.

<sup>7</sup> The fund is responsible for all claims (1) where the last mine employment was prior to January 1, 1970, (2) where the claims were denied prior to the 1977 Amendments but were granted after review under those Amendments, or (3) where a responsible mine operator cannot be found. 30 U.S.C. § 932(j).

claims were being inappropriately denied and responded by thoroughly amending the Act.<sup>8</sup> Among other things, it called for more generous eligibility standards and reconsideration of previously denied claims.<sup>9</sup> The Secretary of HEW responded to the 1972 Amendments by promulgating the so-called "interim presumption" regulation—20 C.F.R. § 410.490. *See Mullins*, 108 S. Ct. at 436-37.

This regulation created a rebuttable presumption that a claimant was "totally disabled due to pneumoconiosis"—and thus eligible for benefits—based on the submission of certain specified types of evidence. To trigger the interim presumption, a claimant either had to prove the existence of "simple pneumoconiosis"<sup>10</sup> directly—through x-rays, a biopsy or (in the case of a survivor's claim) an autopsy—or, if he had fifteen years of coal mine employment, could rely on ventilatory studies showing specified levels of breathing impairment. 20 C.F.R. § 410.490 (b) (1) (i), (ii). In addition, the claimant had to demonstrate that his impairment arose out of coal mine employment. *Id.* § 410.490 (b) (2). To accomplish this, a claimant could rely on a separate presumption of causation, based in the statute,<sup>11</sup> triggered by a showing of pneumoconiosis plus ten years of mine employment.<sup>12</sup> But a claimant with less than ten years of mine exposure was not foreclosed: he could offer direct evidence that his pneumoconiosis arose out of mine employment. *See id.* (incorporating §§ 410.416 (b) and 410.456 (b)). Once

<sup>8</sup> *See* Pub. L. No. 92-303, 86 Stat. 153 (1972).

<sup>9</sup> *See* 30 U.S.C. § 941 (Supp. 1972).

<sup>10</sup> Physicians refer to two levels of pneumoconiosis: simple pneumoconiosis, which may or may not be disabling on its own, and complicated pneumoconiosis, which generally is disabling. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976).

<sup>11</sup> *See* 30 U.S.C. § 921 (c) (1).

<sup>12</sup> Section 410.490 (b) (2) incorporated sections 410.416 and 410.456, each of which authorized a presumption of causation based on ten years of exposure. *See also* 20 C.F.R. § 410.490 (b) (3).

the interim presumption was properly invoked, it could be rebutted by a showing that the claimant was not, in fact, disabled. *Id.* § 410.490 (c). *See generally Mullins*, 108 S. Ct. at 437.

The first interim presumption regulation, however, was expressly limited to Part B claims. 20 C.F.R. § 410.490 (b). The Secretary of Health, Education and Welfare simultaneously promulgated new "permanent" regulations governing the adjudications of Part C claims by the Department of Labor that began in 1973. *See id.* §§ 410.401-.476. The key feature of these regulations was the requirement that all claimants *prove* not only that they had pneumoconiosis caused by coal mining but also that they were totally disabled.<sup>13</sup>

The results of the 1972 regulatory changes were therefore predictable. As the Part B "claims approval rate increased, Labor's remained low, in large part because of the absence of an interim presumption." *Mullins*, 108 S. Ct. at 437.<sup>14</sup> At the same time, the Department of Labor built up a huge backlog of claims that were still awaiting

<sup>13</sup> *See* 20 C.F.R. §§ 410.410, .412, .422-.426.

<sup>14</sup> *See also* Solomons, "A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of its Unresolved Issues," 83 W. Va. L. Rev. 869, 873 (1981) ("The inapplicability of the interim presumption to Department of Labor claims was, at a very early date, recognized as perhaps the most significant factor accounting for this approval rate disparity.") (footnotes omitted). While the SSA approval rate reached 70 percent by 1976, the Labor approval rate was less than 10 percent. Speech by Robert D. McGillicuddy, Assistant to the Staff Director of the House Subcomm. on Labor Standards, before the Legal Staff of the Benefits Review Board (September 26, 1978), *reprinted in* House Comm. on Education and Labor, 96th Cong., 2d Sess., Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977, at 1236 (Comm. Print 1979) (hereinafter "House Committee Print"). *See also* Solomons, *supra*, at 873 n.14; Lopatto, "The Federal Black Lung Program: A 1983 Primer," 85 W. Va. L. Rev. 677, 691 (1983).



any determination at all.<sup>15</sup> This state of affairs led to a series of legislative proposals requiring the application of the SSA interim presumption regulation to all Part C claims.<sup>16</sup> By 1977, these proposals led to the passage in the House of a bill that would have required the Secretary of Labor to promulgate regulations containing "criteria" for determining "total disability" that were "not . . . more restrictive" than those applied to Part B claims.<sup>17</sup> The Senate, although equally cognizant of the flaws in the existing Part C regulations, pursued a different path—amending the House bill so that it would have required the Secretary to establish new criteria "for all appropriate medical tests . . . which accurately reflect total disability in coal miners."<sup>18</sup>

In the version of the bill ultimately developed by a conference committee and passed by both houses, these two solutions were combined. The House proposal re-

<sup>15</sup> By 1978, the Secretary had received well over 100,000 Part C claims, but only about half had received any initial determination. Lopatto, *supra* note 14, at 691; McGillicuddy, *supra* note 14, at 1236.

<sup>16</sup> See, e.g., H.R. 2913, 94th Cong., 1st Sess. § 3 (1975), reprinted in House Committee Print, *supra* note 14, at 49-50 ("The standards for determining whether a minor who filed a claim after July 1, 1973, is totally disabled due to pneumoconiosis shall not be more restrictive than the standards prescribed by the Secretary for evaluating claims filed prior to July 1, 1973."); H.R. 10760, 94th Cong., 1st Sess. § 7(a) (1975), reprinted in House Committee Print, *supra* note 14, at 83 ("With respect to a claim filed after June 30, 1973, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973.") These proposals originated in 1974 with the legislative office of the United Mine Workers. See Black Lung Amendments of 1973: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 93d Cong., 1st & 2d Sess. 349 (1974) (hereinafter "1973-74 House Hearings").

<sup>17</sup> H.R. 4544, 95th Cong., 1st Sess. § 7(a) (1977), reprinted in 123 Cong. Rec. 29828 (1977).

<sup>18</sup> See 123 Cong. Rec. 29924 (1977); S. Rep. No. 209, 95th Cong., 1st Sess. 28, 35 (1977).

quiring criteria "not . . . more restrictive" than SSA's was accepted, but was limited to all claims filed prior to the final promulgation of new permanent standards that would govern all later claims.<sup>19</sup> Thus, Congress mandated a second, time-limited "interim" standard. In addition, the final bill created a mechanism for dealing with the large number of Part C claims that had either been denied under the old permanent regulations or were part of the backlog of claims awaiting some determination. That mechanism was a requirement that the Secretary "review each claim" that had been denied or was pending as of the effective date of the new statute, "taking into account the amendment made to this part by the Black Lung Benefits Reform Act of 1977," and "approve any such claim forthwith" if the new standards required such approval. 30 U.S.C. § 945(b)(1).<sup>20</sup> These reviews were also to be governed by criteria "not . . . more restrictive" than those used by SSA under Part B. See 30 U.S.C. § 902(f)(2)(A), (B).

In response to the 1977 Amendments, the Secretary promulgated a new interim presumption regulation applicable to all pending or previously denied claims, as well as all claims filed prior to the final promulgation of new permanent standards. See 20 C.F.R. § 727.203. This regulation was in effect until March 31, 1980, when new permanent standards were put in place. See *id.* § 718.2. The Secretary also provided by regulation for expedited review of all pending or denied claims to determine whether they would qualify under the revised standards. See *id.* § 727.108. Those reviews went forward and, largely by virtue of the application of the interim pre-

<sup>19</sup> See 30 U.S.C. § 902(f)(2); H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), reprinted in House Committee Print, *supra* note 14, at 887 (hereinafter "House Conference Report").

<sup>20</sup> The Secretary was further instructed not to require submission of any further evidence "if the evidence on file is sufficient for approval of the claim," *id.* § 945(b)(2)(A), and was told to award benefits retroactively, *id.* § 945(c).

sumption, the rate of claims approval by the Department of Labor changed dramatically. Prior to the 1977 Amendments, less than 10 percent of Part C claims were being approved. *See* note 14 *supra*. After completion of the reviews, 45 percent of the Part C claims subject to review had been approved.<sup>21</sup>

The problem that led to this litigation was the fact that one category of Part C claimants—those with less than ten years' experience in coal mines—could not benefit from these changed standards because they were categorically excluded from application of the new interim presumption. The new regulation treated miners with more than ten years' experience essentially the same as they were treated under the old SSA rule: they submitted specified types of medical evidence, along with proof of ten years of mine employment, and were thereafter rebuttably presumed to be totally disabled due to pneumoconiosis arising out of that mine employment.<sup>22</sup> However, the regulation expressly barred invocation by miners who had not "engaged in coal mine employment for at least 10 years." 20 C.F.R. § 727.203(a). Even if, for example, they submitted direct x-ray evidence of pneumoconiosis and affirmative evidence linking that disease to work in coal mines, their claims were reviewed or adjudicated under the same "permanent" standards that Congress had rejected.<sup>23</sup> These claimants were there-

<sup>21</sup> There were 125,229 Part C claims pending or denied as of the effective date of the 1977 Amendments. Of these, 56,957 had been approved when reviews were completed in 1980. Secretary of Labor, Annual Report to Congress on the Black Lung Program 4 (1980).

<sup>22</sup> Indeed, the new rule broadened the types of medical evidence that could be used to trigger this presumption. *See* 20 C.F.R. § 727.203(a)(3)-203(a)(5).

<sup>23</sup> *See* 20 C.F.R. §§ 727.4(b), .203(d). The new permanent regulations, set out in 20 C.F.R. Part 718, did not take effect until March 31, 1980, after many of the reviews had already been completed. Even thereafter, the Benefits Review Board continued to take the position that claims filed prior to March 31, 1980, and excluded

fore denied the key benefit that Congress sought to bestow—the ability to shift the burden of proof on the issue of disability by offering evidence of pneumoconiosis arising out of coal mine employment.<sup>24</sup>

The miners who had their pending or denied claims reviewed by the Secretary, but were denied the benefit of the interim presumption because they lacked ten years of exposure, received summary notices from claims examiners indicating that the evidence in their files did not qualify even under the revised standards of the 1977 Amendments. They were told that they had only one option—to attempt to supply additional evidence *proving* their disability either to the claims examiner, *see* 20 C.F.R. § 727.108(d)(1), or at a full hearing before an administrative law judge, *see id.* § 727.109.<sup>25</sup>

from the Labor interim rule, should be adjudicated under the old permanent standards. *See Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627 (Ben. Rev. Bd. 1981). *But see Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 406 n.9 (7th Cir. 1987). In any event, the new permanent standards, like the old ones, contained no presumption of disability comparable to the interim presumption.

<sup>24</sup> The regulations suggest that these claimants may have received some tangential benefits as a result of the 1977 Amendments, because the old permanent standards were applied in such a way as to reflect *other* changes made by those Amendments. *See* 20 C.F.R. § 727.4(b). But these other changes were largely meaningless for those claimants who could show pneumoconiosis arising out of coal mine employment but were barred from using the interim presumption because they lacked ten years of mine employment. Thus, for example, the Amendments prohibited the Secretary, under certain circumstances, from "re-reading" x-rays that had been interpreted by a qualified radiologist as showing pneumoconiosis. 30 U.S.C. § 923(b). This issue, however, could hardly help the claimants at issue here, who lacked the right to invoke a presumption of disability based on such x-rays. Similarly, the Amendments broadened the definition of "pneumoconiosis." *id.* § 902(b), but these claimants, by hypothesis, could show pneumoconiosis under the old narrower definition.

<sup>25</sup> Claimants were given 30 days in which to indicate that they would supply additional evidence. Coal Mine (BLBA) Procedure



Unsurprisingly, most such claimants failed to pursue their claims further. Many had previously had their same claims denied under the same non-presumptive disability standards that they were still being asked to satisfy. Others had already waited years for any determination. Moreover, since very few were represented by counsel, they had no realistic way of knowing that, after undergoing the ALJ hearing process, they might be able to mount a statutory challenge to the standards being applied by the Secretary before the Benefits Review Board or in a court of appeals.

Nevertheless, the Secretary's version of the interim presumption did not go totally unchallenged. To date, four courts of appeals have held that the Secretary had deviated from the statutory mandate of promulgating criteria "not . . . more restrictive" than those previously applied under Part B. See *Halon v. Director, Office of Workers' Compensation Programs*, 713 F.2d 21 (3d Cir. 1983); *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966 (8th Cir. 1985); *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139 (6th Cir.), petition for cert. filed, No. 87-1045 (1987); *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327 (4th Cir. 1987), cert. granted, No. 87-1095 (1988). The only dissent from this line of authority was the Seventh Circuit's ruling in *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987).

The instant case arose after the Eighth Circuit's ruling in *Coughlan*. The Department of Labor had taken the position that it would apply the *Coughlan* ruling only in pending cases. Respondents, four former Iowa coal miners who had been denied benefits during the 1970s, filed suit seeking designation as representatives of the

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Manual ch. 2-1600, ¶ 22. There was a 60-day deadline for requesting an ALJ hearing after a claim was finally denied. 20 C.F.R. § 725.410(c).

class of claimants who (1) were denied the benefit of the interim presumption by virtue of the exclusion of claimants lacking ten years' exposure in 20 C.F.R. § 727.203, and (2) did not have claims that remained active in the administrative process. Jurisdiction was predicated on 28 U.S.C. § 1361, the general mandamus statute. Respondents sought an order directing the Secretary to comply with 30 U.S.C. § 945(b) by reviewing the file of each such claimant and applying the standards mandated by the 1977 Amendments.

The defendants moved to dismiss the case for want of jurisdiction, arguing that the existence of an administrative review process for black lung claims—culminating in court of appeals review of decisions of the Benefits Review Board—precludes district court jurisdiction over the instant case. The plaintiffs responded that their claim of a right to appropriate Secretarial reviews of their files could only be vindicated through this mandamus action, and that jurisdiction was therefore not precluded.

The district court granted the motion to dismiss. U.S. Pet. App. 19a-22a. It held that respondents had not made the showing required for recognition of an exception to the statutory review process. In so doing, it acknowledged the possibility of non-statutory review in cases where statutory appeal mechanisms cannot vindicate the right at issue, but suggested that it would be more appropriate to bring such a case directly in a court of appeals under the All Writs Act, 28 U.S.C. § 1651. U.S. Pet. App. 21a.

A unanimous panel of the Eighth Circuit reversed. It acknowledged that statutory review procedures are "generally the exclusive means of review," and that there is a presumption against the availability of "simultaneous review of administrative actions in both the district court and the circuit court of appeals." U.S. Pet. App. 3a-4a. But it held that there is a "residuum" of jurisdiction in the district courts to enforce the Black Lung Benefits Act in a case of a "patent violation of agency authority



or manifest infringement of substantial rights irremediable by the statutorily prescribed method of review.' " U.S. Pet. App. 4a (quoting *Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984), and *Nader v. Volpe*, 466 F.2d 261, 265-66 (D.C. Cir. 1972)). That jurisdiction, it held, may be predicated on section 1361, the mandamus statute. *Id.*

The court went on to conclude that, under the 1977 Amendments, the Secretary had a "clear nondiscretionary duty" to reopen and review all pending and denied Part C claims under the standards mandated by that statute. *Id.* at 12a. This duty, it held, was not fulfilled because claimants lacking ten years of mine exposure were excluded from coverage by the new standards that the Secretary had promulgated in conformance with the 1977 Amendments.<sup>26</sup> *Id.* The court then concluded that enforcement of this clear duty through mandamus was not foreclosed either by the usual requirement of exhaustion of administrative remedies or by the limitations periods applicable in the administrative process. *Id.* at 13a-18a. It drew a distinction between the specific right at issue here—the right to have existing claims reviewed *sua sponte* under the new criteria mandated by the 1977 Amendments—and the general right of eligible claimants to receive benefits. *Id.* at 13a. A mandamus action is appropriate here, in the court's view, because the administrative remedies provided by statute address only the latter issue and could not, in principle, vindicate claimants' right to an automatic review. It follows that neither the existence of an administrative review process, nor the time limits governing that process, prevent respondents from pursuing their claim in district court.

<sup>26</sup> The Eighth Circuit also found a violation of a clear duty with respect to those claims that were filed after the effective date of the 1977 Amendments and prior to April 1, 1980—all of which were also statutorily required to be adjudicated under criteria "not . . . more restrictive" than those used under Part B, 30 U.S.C. § 902(f)(2)(C). See U.S. Pet. App. 12a.

The Eighth Circuit remanded the case with instructions to certify an appropriate class and award class members the limited relief of new, valid Secretarial reviews of their claim files, applying criteria satisfying the statutory mandate. Requests for rehearing *en banc* by both the Secretary and various private intervenors were denied.

### SUMMARY OF ARGUMENT

The interim rule adopted by the Secretary, 20 C.F.R. § 727.203, by excluding claimants who lack ten years of mine employment, contravened the statutory requirement of criteria "not . . . more restrictive" than those previously used under Part B. See 30 U.S.C. § 902(f)(2). These claimants could submit direct evidence of pneumoconiosis arising out of coal-mine employment, but, unlike under Part B, this evidence would not trigger a presumption of disability. Instead, these claims were still adjudicated, or reviewed under 30 U.S.C. § 945, using the old Part C permanent standards, 20 C.F.R. §§ 410.401-.476, which Congress had rejected as unfair and which required affirmative proof of "total disability."

Petitioners attempt to defend this outcome on the theory that (1) the statutory "not . . . more restrictive" requirement applies only to *disability* criteria, and (2) the exclusion of claimants with less than ten years of mine employment relates to the separate eligibility issue of "causation" by coal-mine employment. Each of these propositions is demonstrably false. First, there is no basis for asserting that the Secretary was left the discretion to create any new eligibility criteria more restrictive than SSA's, regardless of which eligibility issue they were intended to address. Any such new criterion, after all, would interfere with the achievement of the central statutory objective, which was to assure application of the interim presumption of disability to all Part C claimants. Moreover, the statute and its legislative history do not support any limitation of the "not . . . more restrictive" requirement to disability criteria alone.

Second, the exclusion at issue here cannot in any event be viewed as a "causation-related" criterion. In fact, its sole effect was to determine whether claims would be assessed under the new interim standards or under the old permanent standards—i.e., to determine the burden of proof on the issue of *disability*. Moreover, when the Department promulgated the new interim rule, it also proposed new permanent standards, applicable to later claims, that expressly contemplated that claimants lacking ten years of mine employment could prove that their pneumoconiosis was caused by that employment. 20 C.F.R. § 718.203. This fact makes it clear that the Secretary never made a general determination that pneumoconiosis shown by such claimants could not be causally related to coal mining. In any event, such a determination, on its face, would make no sense, since years of coal mining (although less than ten) can certainly be at least a *contributing* cause of pneumoconiosis.

Petitioners attempt to sustain their argument by asserting that respondents' claim would lead to the invalidation of some of the rebuttal criteria in section 727.203 (b) and thereby would undermine the constitutionality of the Labor interim presumption. This argument is misplaced because the full range of rebuttal criteria in the Labor rule would remain valid even if the Court were to agree with respondents that all of the relevant Part C claimants have a right to *invoke* the interim presumption on terms "not . . . more restrictive" than those prevailing under Part B. See *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (6th Cir.), *petition for cert. filed*, No. 87-1045 (1987).

Equally misplaced is petitioners' plea for deference to the Secretary. Here, the Secretary promulgated a rule in obvious tension with the statutory mandate without offering any explanation of the rule itself or of its consistency with the statute. She has now offered a rationalization that is inconsistent with her previous de-

scription of the statute, inconsistent with the actual operation of this regulation and with the other regulations she has promulgated, and irrational on its face. In such a context, there is no basis for deference. *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971).

Assuming the invalidity of the Secretary's interim rule, it is clear that appropriate relief should extend to the members of the proposed *Sebben* class—claimants who did not pursue appeals from the denial of their claims. Most of these class members had a special statutory right under 30 U.S.C. § 945 to have their pending or previously denied claims reviewed automatically by the Secretary under new standards comporting with the 1977 Amendments. Congress emphasized that these claimants, having filed potentially valid claims only to see them improperly denied or caught up in huge backlogs, should not be required to take any action to receive the benefit of a review applying the interim presumption. The Secretary, however, effectively denied this benefit to all claimants lacking ten years of mine employment.

This "collateral" right to a Secretarial review cannot, in principle, be enforced through the statutorily provided administrative review process, which is addressed only to substantive eligibility for benefits. Moreover, imposing a requirement of exhaustion of administrative remedies as a prerequisite to enforcement of this right would necessarily cause irreparable harm. Once a claimant is forced to take the step of filing an administrative appeal, the right to an *automatic* review is already lost. In addition, Congress specifically recognized that claimants would not, in most cases, take any steps to initiate a new review. An exhaustion requirement, by requiring claimants to undergo onerous appeals to obtain a valid review, would disqualify most of the affected claimants from receiving any benefits under the 1977 Amendments, contrary to the explicit intent of Congress. For all of these reasons, the *Sebben* class should be allowed to enforce this collateral



right directly in court. *Bowen v. City of New York*, 106 S. Ct. 2022 (1986); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Finally, section 1361, the general mandamus statute, was an appropriate vehicle for enforcing this right. Section 1361 provides authorization for judicial enforcement of clear statutory duties where, as here, other jurisdictional provisions arguably do not apply. Moreover, if respondents have demonstrated a conflict between the interim regulation and a statutory duty that is clear enough to justify invalidation of the regulation, then mandamus relief is also necessarily appropriate.

## ARGUMENT

### I. THE EXCLUSION OF CLAIMANTS WITH LESS THAN TEN YEARS' EXPOSURE IN THE 1978 LABOR "INTERIM" REGULATION IS PLAINLY INCONSISTENT WITH THE STATUTORY MANDATE.

Although the regulatory provisions at issue here are somewhat complex, a fair reading leads to only one conclusion—that the Secretary failed to promulgate interim standards satisfying the statutory requirement that they “not be more restrictive than the criteria applicable to a claim [under Part B].” 30 U.S.C. § 902(f)(2). The Secretary’s interim regulation does contain some medical “criteria” comparable to those in the earlier Part B interim regulation, but, unlike under Part B, use of these criteria to prove compensable disability is limited to miners with ten years of coal mine employment. Those with any less exposure are required to prove their claims under much more stringent medical criteria, and without the benefit of a rebuttable presumption of disability based solely on specified diagnostic tests. For this group of claimants, therefore, the Secretary’s “criteria” are dramatically more “restrictive.” Moreover, petitioners’ attempt to defend this double standard as reflecting a

judgment about the separate issue of “causation” is unavailing.

### A. The Secretary’s Interim Regulation Is Plainly More “Restrictive” Than Its Predecessor.

There is no doubt that the Secretary’s interim presumption regulation excludes claimants who would have qualified under the SSA version of the rule.<sup>27</sup> Under relevant portions of the SSA rule, claimants were required to prove the existence of pneumoconiosis, 20 C.F.R. § 410.490(b)(1)(i), and a causal link between this disease and coal-mine employment, *id.* § 410.490(b)(2), and thereby won the benefit of a rebuttable presumption of total disability. Under the 1978 Labor interim presumption, by contrast, claimants can submit the same direct evidence of pneumoconiosis and causation by coal-mine employment, but, if they cannot also show ten years of such employment, the presumption of disability is denied. 20 C.F.R. § 727.203(a).

It is also clear that the impact of this difference has been substantial in many cases. The history of the black lung program establishes that the chances of prevailing on a claim vary dramatically depending on whether the claimant is eligible to invoke the interim presumption.<sup>28</sup>

<sup>27</sup> The private petitioners attempt to suggest that the SSA interim presumption was not, *in practice*, applied to claimants with less than ten years of mine exposure. *Br. of Petrs. Pittston Coal Group, et al.* at 11 n.23. This suggestion, however, is contradicted by the applicable case law. See *Cantrell v. Califano*, 578 F.2d 549, 551 (4th Cir. 1973) (*per curiam*) (where Part B claimant lacked ten years of mine exposure, Appeals Council went on to assess evidence of causation directly); *Maxey v. Califano*, 598 F.2d 874, 876 n.3 (4th Cir. 1979) (*per curiam*) (remanding for, *inter alia*, consideration of causation evidence if claimant found to lack ten years’ employment).

<sup>28</sup> See page 5 *supra*. Prior to 1978, when all Labor adjudications were done under the 1972 version of the “permanent” regulations, the rate of claim approval “hovered between 8-9%,” Solomons, *supra* note 14, at 873 n.14, while SSA, applying its version of the interim presumption, was approving a large majority of



This reality is a natural outgrowth of the basic problem that led to the creation of statutory and regulatory presumptions under this program—the fact that “it is difficult for coal miners whose health has been impaired by the insidious effects of their work environment to prove that their diseases are totally disabling and coal-mine related, or that those diseases are in fact pneumoconiosis.” *Mullins, supra*, 108 S. Ct. at 439. In many cases, the outcome depends on whether the claimant is able to shift the burden of proof through the submission of evidence that would not, on its own, definitively establish a total disability due to coal-mine-related pneumoconiosis.

These undisputed facts, we submit, are sufficient to establish that the Secretary did not comply with the requirement of establishing disability criteria “not . . . more restrictive” than those utilized by SSA. See 30 U.S.C. § 902(f)(2). This class of claimants, if eligible to utilize the SSA rule, would have had the important advantage of the interim presumption of disability. Under the Labor rule, however, that advantage was denied to them, with predictable results.

Any doubt on this score should be allayed by an examination of the reasons why Congress enacted the “not . . . more restrictive” requirement. Those reasons were essentially twofold. First, as noted above, Congress believed that the old permanent standards, applied to all Part C claimants from 1973 to 1978, were simply unfair. As the 1977 House Report put it, the Secretary of HEW, who promulgated these permanent standards, had “literally saddled the Department of Labor with rigid and difficult medical standards.”<sup>29</sup> Abundant testimony at numerous

claims, Lopatto, *supra* note 14, at 693. Similarly, by 1981, one year after the Secretary stopped applying the Labor version of the interim presumption, the approval rate for newly filed claims again “dropped significantly.” *Id.* at 694-95.

<sup>29</sup> H.R. Rep. No. 151, 95th Cong., 1st Sess. 15 (1977), reprinted in House Committee Print, *supra* note 14, at 568 (hereinafter “1977 House Report”).

hearings led Chairman Carl Perkins, the leading House sponsor of the 1977 Amendments, to conclude that the existing Part C standards were “absolutely ridiculous and shameful”<sup>30</sup> and required claimants “to have one foot in the grave.”<sup>31</sup> Yet, under the Secretary’s interim rule, these were precisely the standards—including specifically a requirement of *proving* disability—that were used to determine the eligibility of claimants who lacked ten years of mine exposure.<sup>32</sup>

A second congressional concern was the inequitable treatment of claimants who filed before and after the June 30, 1973 deadline that terminated the Part B program and initiated the Part C program. The hearings were replete with discussion of the differences between the two sets of standards,<sup>33</sup> and complaints that uninformed claimants had forfeited any realistic chance for benefits by filing under Part C only days or weeks after the deadline.<sup>34</sup> The final House Report noted these differences, flatly rejected the justifications offered to support them, and indicated that the requirement of “not

<sup>30</sup> Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor, 95th Cong., 1st Sess. 66 (1977) (hereinafter “1977 House Hearings”).

<sup>31</sup> 1973-74 House Hearings, *supra* note 16, at 398.

<sup>32</sup> See note 23 *supra*.

<sup>33</sup> See, e.g., 1977 House Hearings, *supra* note 30, at 111 (Statement of Arnold Miller, Pres., UMW) (“In order to qualify for Federal black lung benefits miners who applied on or after June 30, 1973, must be far sicker than miners who applied before that date.”); *id.* at 243 (Statement of Donald Elisburg, Asst. Secy. of Labor) (“[M]any miners . . . have been denied part C benefits despite having medical conditions that would have met the part B criteria.”).

<sup>34</sup> See, e.g., 1977 House Hearings, *supra* note 30, at 29-30 (Statement of Willie Anderson); *id.* at 49-50 (Statement of Jerry Rhodes); *id.* at 62 (Statement of Bud Friend); *id.* at 63-64 (Statement of Andrew Morris).

. . . more restrictive" criteria in section 902(f)(2) would deal with the problem.<sup>35</sup> And the final bill preserved this solution, requiring that interim standards at least as generous as SSA's be applied to all claimants until new, *prospectively* applicable permanent standards could be developed.<sup>36</sup> Nevertheless, under the Secretary's rule, this legislative goal was not fully achieved. One class of claimants—miners lacking ten years of mine employment—remained subject to precisely the inequity that Congress sought to eliminate. They were required to meet the onerous permanent standards even though, if they had filed earlier, they would have qualified for the Part B interim presumption.

**B. The Regulation Cannot Be Justified As Reflecting A Valid Determination About "Causation" of Pneumoconiosis.**

Petitioners do not deny the existence of a large class of claimants who were denied benefits primarily because the Secretary's interim presumption was more restrictive than SSA's. They nevertheless contend that the Secretary's rule comported with the statute because it offered all claimants equally generous "medical" criteria triggering a presumption of "total disability." While one class of claimants—those lacking ten years of mine ex-

<sup>35</sup> 1977 House Report, *supra* note 29, at 15. The report then reprinted a letter in which the Department of Labor had argued for equalization of all Part B and Part C eligibility standards. *Id.* at 15-19.

<sup>36</sup> See *Halon v. Director*, 713 F.2d at 25 ("The plain language of [sections 902(f)(2) and 945] suggests that in cases adjudicated pursuant to section 945 the rules of adjudication will be at least as favorable in the Labor Department as in the Department of Health and Human Services."); *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627, at 1-631 (Ben. Rev. Bd. 1981) (section 902(f) "reflects Congressional concern for the disparate treatment of Part B and Part C claims under the Act as amended through 1972"); *id.* at 1-634 ("Congress intended the application of a uniform standard for adjudication of all claims filed prior to promulgation of the new" permanent standards).

posure—were barred from using this presumption, petitioners argue that this was merely the indirect result of an additional requirement related not to the issue of "disability," but to the issue of "causation" by coal-mine employment.

This line of argument is simply wrong. To begin with, while Congress did focus primarily on the key feature of the SSA interim rule that made it different from the permanent regulations—a rebuttable presumption of disability based on specified medical evidence—that hardly means that it left the Secretary discretion to incorporate this feature of the SSA rule but erect new barriers to eligibility like a flat requirement of ten years of exposure. To the contrary, Congress made clear its desire to make the presumption available to all of the relevant Part C claimants. And there is literally nothing in the legislative history suggesting that Congress would have permitted this benefit to be denied to claimants through the creation of new categorical barriers to eligibility.

In addition, even assuming that the Secretary retained discretion to create new categorical exclusions relating to issues, like "causation," that are separate from the issue of "disability," the requirement at issue here cannot be justified on that basis. Petitioners' suggestion that the ten-year requirement reflects a determination about causation is so illogical and so inconsistent with the Secretary's other regulations as to be implausible. At the same time, their somewhat contradictory efforts to conjure up a congressional "recognition" to which the Secretary supposedly was responding are totally unsupported.

**1. The Secretary Was Not Empowered to Promulgate Any Eligibility Criteria More Restrictive Than Those in the SSA Interim Rule.**

There is no doubt that the primary concern of Congress in passing section 902(f)(2) was the issue of disability. After all, it was only in the area of presum-



ing disability that the Part B interim standards and the old Part C permanent standards were materially different. As noted above, the Part B interim standards and the old permanent standards both required claimants to prove the other two elements of a claim—pneumoconiosis and causation—except where certain generally applicable statutory presumptions came into play.

But this obvious fact hardly means that Congress left the Secretary the discretion to erect new eligibility barriers not directly linked to disability *per se*. Such a barrier, after all, would necessarily prevent the achievement of the goals Congress was pursuing. Any new eligibility requirement in the Labor interim rule would predictably disqualify some class of claimants from receiving the benefit Congress wanted to bestow—the right to prove their claim using the interim presumption.<sup>37</sup> This, in turn, would lead to a perpetuation of the unequal treatment of Part B and Part C claimants that Congress sought to eliminate. Indeed, as we have discussed, the Secretary's exclusion of miners lacking ten years of mine employment had precisely these effects.

Faced with this fundamental reality, petitioners present not a shred of evidence that Congress actually anticipated that the Secretary would include new eligibility requirements in the interim rule. The most that they can offer are technical arguments for the proposition that it was plausible for the Secretary to construe the term "criteria" in section 902(f)(2) as referring only to *medical* criteria. For the reasons already stated, these arguments are beside the point, since they ignore the fact that *any* new eligibility requirement would be inconsistent with Congress's clear desire to extend the

<sup>37</sup> As Chairman Perkins put it, the law required the Labor Department to "apply the interim standards to *all* of the claims filed under Part C, at least until such time as the Secretary of Labor promulgates new standards consistent with the authority this legislation gives him." 124 Cong. Rec. 3431 (1978) (emphasis added).

interim presumption of disability to all claimants who filed during a specified time period. In any event, petitioners' arguments for a narrow interpretation of the requirement of "not . . . more restrictive" criteria are wrong on their own terms.

Those arguments begin with the fact that the requirement appears in a definition of "total disability." Petitioners suggest that this placement indicates a legislative intent to *allow* more restrictive "criteria" relating such issues as "causation" by coal-mine employment. The problem with this argument is the fact that "total disability," as defined in section 902(f), specifically incorporates all *three* elements of a successful claim—(1) inability to engage in gainful employment, (2) due to pneumoconiosis, (3) arising out of coal mine employment.<sup>38</sup> Thus, Congress deliberately transformed this statutory phrase into a term of art incorporating an entire range of specific policy judgments involving all aspects of eligibility, including causation.<sup>39</sup> This defini-

<sup>38</sup> The statute thus provides that a miner is considered "totally disabled when *pneumoconiosis* prevents him or her from engaging in gainful employment" requiring skills and abilities comparable to mining. 30 U.S.C. § 902(f)(1)(A) (emphasis added). The definition of "pneumoconiosis," in turn, incorporates the element of causation by providing that it means a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, *arising out of coal mine employment*." *Id.* § 902(b) (emphasis added). See also 20 C.F.R. § 718.204(b) ("*Total disability defined*. 'A miner shall be considered totally disabled if . . . *pneumoconiosis* as defined in § 718.201 prevents or prevented the miner [from] performing his or her usual coal mine work . . . .'" (first emphasis in original; second added); *id.* § 718.201 ("'[P]neumoconiosis' means a chronic dust disease of the lung [etc.] *arising out of coal mine employment*.")) (emphasis added). In this sense the statutory provisions authorizing benefits to those who are "totally disabled due to pneumoconiosis" are redundant. See 30 U.S.C. §§ 901(a), 921(a).

<sup>39</sup> Senator Randolph noted that "'[t]otal disability' is listed as a definition, which I think is fair, but the term is substantive as well as descriptive." 123 Cong. Rec. 24239 (1977). And in the 1977



tional section was therefore a natural place to locate a requirement incorporating all aspects of the Part B interim rule.

This reading is confirmed by the legislative history. For example, in announcing the final version of the bill, the conference committee indicated that the "not . . . more restrictive" requirement applied to "the determination of total disability or death due to pneumoconiosis."<sup>40</sup> The phrase "total disability . . . due to pneumoconiosis" is specifically used in the statute to summarize all elements of eligibility, including causation,<sup>41</sup> and was used in precisely the same way in the old SSA interim rule to which Congress was referring in section 902(f)(2).<sup>42</sup> Chairman Perkins then made the breadth of the incorporation even clearer, stating that in the Secretary's reviews of pending or denied claims, "the 'interim' standards are exclusively and unalterably applicable with respect to *every area they now address*, and may not be made or applied more restrictively than they were in the past. . . ." <sup>43</sup>

For similar reasons, the Secretary's current position is not materially aided by the scattered statements in the legislative history suggesting that the "criteria" at issue

Amendments Congress also used this definitional section to impose on the Secretary of Labor a series of requirements concerning determinations of the presence of *pneumoconiosis*. See 30 U.S.C. § 902(f)(1) (incorporating relevant provisions of § 923(b)).

<sup>40</sup> See House Conference Report, *supra* note 19, at 16 ("The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 . . .")

<sup>41</sup> See p. 3 *supra*.

<sup>42</sup> See 20 C.F.R. § 410.490(b) (a "miner will be presumed to be totally disabled due to pneumoconiosis," and therefore eligible for benefits, if the specified criteria are met).

<sup>43</sup> 124 Cong. Rec. 3426 (1978) (emphasis added).

were "medical" in nature. As petitioners are fully aware, during the relevant period, *all* of the substantive eligibility standards provided either under Part B or under Part C were commonly referred to as the "medical standards" or "medical regulations."<sup>44</sup> This terminology reflects the fact that all three elements of a successful claim for benefits—(1) disability, (2) pneumoconiosis, and (3) causation by coal-mine employment—involve issues that are mainly, if not exclusively, matters of medical expertise.<sup>45</sup> There is thus no reason to believe that these legislative references to "medical" criteria are in any tension with the other indications, discussed above, that Congress intended the complete incorporation of all of the Part B eligibility criteria.

Petitioners attempt to draw support from another usage of the term "criteria" in 30 U.S.C. § 902(f)(1)(D), where Congress instructed the Secretary to develop, for inclusion in the new "permanent" regulations, "criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners."

<sup>44</sup> See, e.g., S. Rep. No. 209, 95th Cong., 1st Sess. 14 (1977) (Senate bill "does not require nor preclude the blanket incorporation of any provision now a part of the existing HEW *medical eligibility regulations* (subpart D, 20 C.F.R. Part 410)"); (emphasis added); Letter from William Kilberg, Solicitor of Labor, to John Rhinelander, General Counsel, HEW, September 13, 1974, reprinted in 1977 House Report, *supra* note 29, at 19 (stating, in the course of arguing for blanket incorporation of all Part B standards in Part C cases, that SSA should "amend its *medical regulations* to permit the use of the interim criteria in Department of Labor cases") (emphasis added); 43 Fed. Reg. 36825 (August 18, 1978) (referring to *all* of the substantive eligibility criteria in 20 C.F.R. Part 727 as "medical criteria for determining eligibility").

<sup>45</sup> Certainly, in common understanding, the issue of the cause of a disabling disease is one that physicians are in the best position to resolve and generally attempt to resolve in the course of providing medical assistance to patients. Indeed, the private petitioners essentially concede that they are relying on a definition of the concept of "medical criteria" that is narrower than normal usage. Br. of Petrs. Pittston Coal Group *et al.* at 27 n.36.

In fact, however, the circumstances make it clear that Congress never intended section 902(f)(2) to refer back to section 902(f)(1)(D), or to have the same specific focus. The language amending Section 902(f)(2) appeared in numerous bills, including two that passed the House,<sup>46</sup> without being accompanied by any reference to criteria for "medical tests." And the new section 902(f)(1)(D) was placed in front of section 902(f)(2) in the conference committee, which was merging features of the House and Senate bills.<sup>47</sup> It follows that there is no basis for assuming any equivalency between these two sections. To the contrary, Congress clearly knew how to refer specifically to criteria for medical tests, and did not do so in section 902(f)(2).<sup>48</sup>

But perhaps the most telling evidence in this regard are statements in the Secretary's own regulations, published simultaneously with the new interim rule, which repeatedly describe the "not . . . more restrictive" requirement as covering not just the issue of disability, narrowly defined, but other eligibility criteria as well. Thus, the preamble to the new interim presumption states that, under the 1977 Amendments, "the criteria for determining whether a miner is or was *totally disabled or died due to pneumoconiosis* shall be no more restrictive than the criteria applicable to a claim filed with [SSA] on or before June 30, 1973, under Part B of Title IV of

<sup>46</sup> See H.R. 4544, 95th Cong., 1st Sess. § 7 (1977); H.R. 10760, 94th Cong., 2d Sess. § 7 (1976).

<sup>47</sup> See House Conference Report, *supra* note 19, at 16.

<sup>48</sup> *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 143 (6th Cir.), petition for cert. filed, No. 87-1045 (1987). See *Russello v. United States*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

the Act (the interim *adjudicatory* rules)."<sup>49</sup> As noted above, the phrase "totally disabled due to pneumoconiosis" is used as shorthand for all standards of eligibility including coal-mining causation, both in the statute and in the SSA interim rule. Similarly, the preamble to the new permanent regulations described the statute as broadly mandating that the "standards to be applied in the *adjudication* of [applicable claims] shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, with [SSA], . . ."<sup>50</sup> All that we seek here is an interim regulation that comports with this description of the statute.

## 2. *The Ten-Year Limitation in the Labor Interim Rule Could Not Have Been Based on a Determination with Regard to "Causation."*

Even assuming that the Secretary would have been acting within the scope of her authority in creating a new requirement reasonably related to screening out those who lacked the requisite "causation," this is not such a case. This explanation of the ten-year requirement is at once so illogical and so inconsistent with the Secretary's other actions that it deserves to be dismissed

<sup>49</sup> 20 C.F.R. § 727.200 (emphasis added). The preamble went on to state that "these rules provide additional standards, not available in the [SSA] interim adjudicatory rules, by which a claimant can take advantage of a presumption of total disability or death due to pneumoconiosis arising out of coal mine employment." *Id.* This statement, combined with another rule that incorporated provisions from the old SSA eligibility standards, *id.* § 727.4(b), may well have led interested persons to believe that claimants could continue to use the interim presumption if they satisfied the old SSA interim rule. If so, this confusion may help to explain the absence of controversy over the 10-year exclusion in 1978.

<sup>50</sup> 20 C.F.R. § 718.1(b) (emphasis added). See also *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 Black Lung Rep. 1-627, at 1-631 (Ben. Rev. Bd. 1981) ("For the adjudication of the claims, Congress required the Secretary to utilize interim criteria which were no more restrictive than the Health, Education, and Welfare Interim Adjudicatory Rules (20 C.F.R. § 410.490).")



out of hand. Instead, it is clear that the Secretary was either acting inadvertently or was simply seeking a way to narrow the class of claimants who could utilize the interim presumption of disability—a goal flatly contrary to legislative intent.

In assessing the plausibility of petitioners' "causation" explanation, it is important to recognize first that it is an *ipse dixit*. There is nothing in the interim rule itself or in contemporaneous statements associated with its promulgation offering any explanation of why claimants lacking ten years of mine employment were being excluded. To the contrary, this explanation first appeared only years later, in briefs filed by the Secretary to defend that rule.

Moreover, the explanation offered simply does not fit the facts. To begin with, the exclusion of claimants lacking ten years of mine exposure did not serve to screen out those who were ineligible because their impairments were not causally linked with coal mining. Its *only* effect was to shift the burden of proof on the issue of total disability. The reason is that claims excluded from the interim presumption because of the absence of ten years of exposure were then assessed under the 1972 "permanent" standards.<sup>51</sup> Those standards expressly authorized claimants who lacked ten years of exposure to prove coal-mine causation of their impairment.<sup>52</sup> Their main distinctive feature was the absence of a rebuttable presumption of disability.

In addition, the *new* permanent standards proposed simultaneously with the Labor interim rule<sup>53</sup>—and ulti-

<sup>51</sup> See note 23 *supra*.

<sup>52</sup> See 20 C.F.R. §§ 410.416(b), .456(b).

<sup>53</sup> On April 25, 1978, after the passage of the 1977 Amendments, the Secretary published proposed regulations including (1) new "permanent" eligibility rules to govern future claims (20 C.F.R. Part 718), (2) new "permanent" procedural rules (20 C.F.R. Part

mately applicable to claims filed after March 31, 1980—also specifically contemplate that claimants lacking ten years of mine employment may nevertheless prove a causal link between that employment and their pneumoconiosis. 20 C.F.R. § 718.203 ("If a miner who is suffering . . . from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.") It follows that some other explanation is required to justify the Secretary's two rules—*i.e.*, to explain why claimants who would otherwise qualify for the interim presumption are categorically excluded absent ten years of exposure, whereas later claimants, who must prove disability under the new permanent standards, do not face such a categorical exclusion. There can be no basis for applying less onerous "causation" criteria in the latter case than in the former.

At the same time, the Secretary's explanation, even taken at face value, makes no sense. The exclusion at issue here, if viewed as involving the issue of "causation," would suggest an underlying determination that clinically demonstrated "simple pneumoconiosis" is never causally linked to coal-mine exposure absent ten years of such exposure. Thus, a person with 9.5 years of exposure, and direct evidence of dust particles injuring his lungs, is barred from even attempting to prove that this condition was caused by mine employment. And this exclusion applies even where, as in most cases, the miner has never

725), and (3) "interim" substantive and procedural rules governing claims previously filed and those filed prior to the effective date of new permanent regulations (20 C.F.R. Part 727). 43 Fed. Reg. 17722 (April 25, 1978). The interim rules and the permanent procedural rules were put into effect on August 18, 1978. 43 Fed. Reg. 36772, 36818. The permanent substantive standards went into effect on March 31, 1980. 45 Fed. Reg. 13678 (Feb. 29, 1980).



been exposed to other dust sources and coal-mine causation is therefore not, in fact, in doubt.<sup>54</sup>

Any semblance of rational support for such a position is destroyed by the fact that the Secretary's regulations, consistent with the intent of Congress,<sup>55</sup> provide that a claimant need only show that his disabling pneumoconiosis "arose at least in part out of coal mine employment." 20 C.F.R. § 718.203(a) (emphasis added).<sup>56</sup> Thus, a claimant may satisfy the causation requirement by showing only that a period of coal-mine exposure, in combination with periods of exposure in non-mining environ-

<sup>54</sup> See, e.g., *Coughlan v. Director, Office of Workers' Compensation Programs*, 757 F.2d 966, 968 (8th Cir. 1983) (Secretary conceded coal-mine causation of pneumoconiosis in miner who lacked ten years of exposure); *Lynn v. Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. 1-125, at 1-129 (Ben. Rev. Bd. 1981) (Miller, J., dissenting) (involving a claimant with 7.5 years of mine employment) ("The administrative law judge further found that '[s]ince the Claimant held no other jobs in which he was exposed to a dusty environment, it is accepted as a fact that his pneumoconiosis arose out of his coal-mine work.'") (emphasis in original). Cf. *Maxey v. Califano*, 598 F.2d 874, 876 n.3 (4th Cir. 1979) (*per curiam*) ("Conversely, if a claimant's non-coal mine employment did not expose him to coal dust, this would be good evidence that his pneumoconiosis arose from his coal mine employment.")

<sup>55</sup> See S. Rep. No. 209, 95th Cong., 1st Sess. 13-14 (1977) ("It is also intended that traditional workers' compensation principles such as those, for example, which permit a finding of eligibility where the totally disabling condition was significantly related to or aggravated by the occupational exposure be included within such regulations.")

<sup>56</sup> See also *id.* § 718.201 (defining "pneumoconiosis") ("For purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment."); *id.* § 727.203(b)(3) (Labor interim presumption may be rebutted where, *inter alia*, "[t]he evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment").

ments, led to his contracting pneumoconiosis.<sup>57</sup> In light of this standard, the Secretary would have had no basis for determining that ten years of mine exposure was a prerequisite of coal-mine causation, even assuming that she had incorporated such a determination consistently in both the interim and permanent rules.

Petitioners, in an effort to lend credence to their explanation, each attempt to manufacture a congressional "recognition" in 1977 to which the Secretary purportedly was responding. First, the Secretary asserts that "the evidence before Congress showed that miners with fewer than ten years of coal mine experience rarely contract black lung disease," Br. of Fed. Petrs. at 15, and describes a "recognition by the House" that miners with less than eleven years of mine exposure have "little" pneumoconiosis, *id.* at 24. Even if true, of course, these assertions would only raise the question of why this recognition was not incorporated in the new permanent standards as well. In any event, the facts before Congress were exactly contrary to the Secretary's remarkable characterizations.<sup>58</sup>

<sup>57</sup> See *Stemps v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1533, 1535 (11th Cir. 1987); *Southard v. Director, Office of Workers' Compensation Programs*, 732 F.2d 66, 70-72 (6th Cir. 1984).

<sup>58</sup> We note that it is at least doubtful that Congress would retain a statutory rebuttable presumption of coal-mine causation based on 10 years of exposure plus evidence of pneumoconiosis, see 30 U.S.C. § 921(c)(1), if it also supported an irrebuttable presumption of the opposite fact based on one day less of exposure.

Petitioners also point out that three members of Congress submitted written comments during the notice-and-comment period on the proposed regulations in 1978, and did not question the exclusion of miners with less than ten years of exposure. Obviously, however, such after-the-fact comments by individual legislators would have little probative weight even if, unlike here, it were clear that the omission of criticism on this issue was deliberate. See *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982); *Southeastern Community College v. Davis*, 442 U.S. 397, 412 n.11 (1979); *Quern*

The sole reference offered by the Secretary is to a report of a consultant, James Weeks, appended to the 1977 House Report. 1977 House Report, *supra*, note 29, at 30. While Weeks did, as the Secretary notes, cite one study that found "little" pneumoconiosis in the x-rays of miners with less than eleven years' exposure, *id.*, he also cited two other x-ray studies showing significant levels of pneumoconiosis within this group.<sup>59</sup> *Id.* at 35 fig. 2, 36 fig. 4. He went on to lament the underreporting of black lung in x-ray studies, *id.* at 31-32, and to cite as "more reliable," *id.* at 31, an autopsy study that found pneumoconiosis in over 60 percent of miners with less than ten years of underground exposure, *id.* at 34 (second figure).<sup>60</sup>

As for the private petitioners, they effectively concede that miners with less than ten years of exposure may have "simple pneumoconiosis"—*i.e.*, precisely the condi-

*v. Mandley*, 436 U.S. 725, 736 n.10 (1978). Ironically, the Secretary herself rejected some of the express assertions in this letter seeking changes in the regulations to bring them back into line with the Act. Thus, her view apparently is that such a letter provides controlling evidence when it supports her but may be disregarded by her at will.

<sup>59</sup> Weeks stated that the "probability" of black lung "increases regularly" (*i.e.*, in a straight line) after ten years of underground exposure. *Id.* at 30. But, far from suggesting the absence of significant disease in miners with less exposure, he then added that "[s]ome sort of respiratory disease is likely to begin after as little as one year underground." *Ibid.* (emphasis added).

<sup>60</sup> This autopsy study was cited repeatedly by Rep. Paul Simon, a key House sponsor of the legislation. See 1977 House Hearings, *supra* note 30, at 173-74, 262. In addition, at a hearing in 1975, Representative Daniel Flood discussed in detail results of a study by the National Institute of Occupational Safety and Health showing that the prevalence of pneumoconiosis in miners with less than ten years of exposure ranged from five to 26 percent depending on the type of coal being mined. Black Lung Benefits Reform Act of 1975: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor, 94th Cong., 1st Sess. 4-6 (1975).

tion that triggers the interim presumption. They make the somewhat different, but equally specious, assertion that it was "accepted" by Congress that "disabling black lung disease is virtually unknown in miners with fewer than ten years of coal mine exposure." Br. of Petrs. Pittston Coal Group *et al.* at 26 (emphasis added).<sup>61</sup> This characterization is based on a single study that was completed well *after* the passage of the 1977 Amendments and was presented to Congress in 1981.<sup>62</sup> In fact, Congress specifically recognized, in 1972 and 1977, that simple pneumoconiosis can be totally disabling.<sup>63</sup>

<sup>61</sup> See also *id.* at 31-32 ("For a miner with fewer than ten years of exposure, uncontradicted proof presented to Congress showed that disabling occupational disease is virtually impossible.") (emphasis added); *id.* at 29 (referring to the "scientific proof amassed by Congress demonstrating no evidence of totally disabling pneumoconiosis in short-term miners").

<sup>62</sup> See Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. of Ways and Means, 97th Cong., 1st Sess. 30-32 (1981) (reporting a study that was first presented at a conference in October 1979). Petitioners' unsupported assertion that the data in this study were "available" in 1978, Br. at 26 n.35, hardly supports their bald assertion that Congress "accepted" its results.

<sup>63</sup> See S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 2305, 2317 ("miners with fewer than fifteen years in the mines who are totally disabled and who have X-ray evidence of pneumoconiosis other than complicated pneumoconiosis, who are now eligible for benefits, will remain so under the Committee amendments"); 1977 House Report, *supra* note 29, at 3 ("Total disability may arise due to either simple or complicated pneumoconiosis.") See also *Kaiser Steel Corp. v. Director, Office of Workers Compensation Programs*, 748 F.2d 1426, 1430 (10th Cir. 1984) ("It is a basic premise of the Act that simple pneumoconiosis can in fact cause disability."); Stephens & Hollon, "Closing the Evidentiary Gap: A Review of Circuit Court Opinions Analyzing Federal Black Lung Presumptions of Entitlement," 83 W. Va. L. Rev. 793, 797 (1981).



More importantly, this argument misses the point.<sup>64</sup> If the Secretary was responding to a congressional recognition about what levels of pneumoconiosis are disabling, then the ten-year requirement must be viewed as reflecting a determination about the issue of *disability* rather than causation. If so, then even under petitioners' narrow interpretation of the 1977 Amendments, the regulation would still violate that statute. It would be "more restrictive" than the SSA interim rule in its criteria for determining who is totally disabled.

In sum, petitioners simply have not presented a plausible argument for why the exclusion of miners lacking ten years of mine exposure had anything to do with causation. It is far more likely that the Secretary made an inadvertent mistake or, as the private petitioners suggest, disagreed with the statutory mandate concerning how the issue of *total disability* should be resolved.

#### C. Petitioners' Discussion Of The Applicable Rebuttal Criteria Is Irrelevant.

In lieu of offering a persuasive rationale for barring claimants from using the interim presumption when they lack ten years of exposure, petitioners and *amici* focus a great deal of attention on differences between the rebuttal criteria in the SSA and Labor versions of the interim rule. They argue that the somewhat broader rebuttal criteria make the Labor rule more "restrictive." They further argue that these additional criteria are essential to make the presumption of disability in the rule constitutional.

These arguments are misplaced for one simple reason: the broader rebuttal criteria of section 727.203(b) would

<sup>64</sup> To begin with, it is hard to see how the recognition posited by the private petitioners can explain the Secretary's decision to make the interim presumption available to some claimants who present evidence of simple pneumoconiosis, while denying the presumption to others presenting precisely the same evidence, based merely on their time of mine employment.

be valid regardless of which side were to prevail in this case. Even if, as respondents contend, the Secretary was required to allow *invocation* of the interim presumption by all claimants using criteria "not . . . more restrictive" than SSA's, she was still authorized to create new rebuttal provisions.<sup>65</sup>

This important distinction was drawn by Congress itself when it passed the 1977 Amendments. The conference committee, in deciding to extend the Part B interim presumption to all Part C claims filed prior to the promulgation of new permanent standards, also sought to ensure that the Secretary's new interim presumption would be fully rebuttable. It did so by mandating that "in determining claims under [the interim] criteria all relevant medical evidence shall be considered in accordance with standards prescribed by the Secretary of Labor."<sup>66</sup> This mandate was then repeated in the preamble to the rebuttal section of the Labor interim presumption—20 C.F.R. § 727.203(b).<sup>67</sup>

We can see no basis for attacking the Secretary's effort to comply with the "all relevant medical evidence" mandate, as expressed in the four rebuttal criteria in section 727.203(b). It follows that the rebuttal provisions are valid and the constitutional concerns raised here are en-

<sup>65</sup> See *Kyle v. Director, Office of Workers' Compensation Programs*, 819 F.2d 139, 144 (6th Cir.), petition for cert. filed, No. 87-1045 (1987).

<sup>66</sup> House Conference Report, *supra* note 19, at 16. This standard was already set out in 30 U.S.C. § 923(b). See *Mullins*, 108 S. Ct. at 435. See also 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) (SSA interim standards apply to Part C "but they may be considered by the Labor Secretary within the context of all relevant medical evidence").

<sup>67</sup> The Secretary has also taken the position that the rebuttal provisions in the SSA interim rule, § 410.490, were not exclusive and thus could not, in any event, control the scope of rebuttal in the Labor version of the rule. See 43 Fed. Reg. 36818, 36826 (August 18, 1978).



tirely misplaced.<sup>68</sup> But it should be reemphasized that nothing in the legislative history indicates any compromise in Congress's determination to allow *invocation* of the interim presumption by all claimants, subject to whatever rebuttal criteria the Secretary might develop.<sup>69</sup>

#### D. There Is No Basis Here For Deferring To The Secretary.

Having presented little or no persuasive evidence supporting the validity of the Secretary's interim rule, petitioners ultimately fall back on a plea for deference to the Secretary's statutory interpretation and explanation of the rule. This plea, of course, is misplaced where, as here, the statute and its history clearly conflict with the Secretary's position. When "Congress has directly spoken to the precise question at issue," and "the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). But even if there were some room for doubt in this case, the usual deference to agency expertise still would have to be tempered, for several reasons.

First, Congress specifically instructed the Secretary, in interpreting the 1977 Amendments, to give the benefit of any doubt to potential claimants.<sup>70</sup> That was hardly done

<sup>68</sup> See *Br. of Petrs. Pittston Coal Group et al.* at 32-33 ("Were the presumed facts rebuttable, as they are under section 727.203, there would be no valid due process objection.") To be sure, we do not concede that these additional rebuttal criteria are constitutionally required. But this issue simply need not arise, since the rebuttal criteria exist, and comport with the will of Congress.

<sup>69</sup> Thus, while Congress did intend generally to equalize the rights of Part B and Part C claimants, *see* page 19 *supra*, it recognized specifically that there might be some differences at the rebuttal stage.

<sup>70</sup> See S. Rep. No. 209, 95th Cong., 1st Sess. 13 (1977) ("In 1972, the Committee stressed that, in interpreting the amendments, the miner should have the benefit of any doubt. The Com-

here. Moreover, we are dealing with a statutory interpretation and an explanation of a regulation that both appeared for the first time in briefs defending the regulation after the fact. As noted above, the Secretary's contemporaneous descriptions of the 1977 Amendments include no suggestion that the legislative incorporation of the Part B eligibility criteria was anything less than complete—indeed quite the contrary.<sup>71</sup> And the administrative record never in any way attempts to explain the exclusion of miners lacking ten years of mine employment as reflecting a determination related to "causation."

In such a context, the *post hoc* rationalizations offered by counsel for the Government are *not* accorded deference.<sup>72</sup> Where the responsible administrative official did not address the statutory requirements in promulgating a regulation, the later explanations offered in litigation are "hardly tantamount to an administrative interpretation." *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971). "It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Id.* "If he faces such questions only after he has acted, there is substantial danger that the

mittee underscores and reaffirms this position taken in 1972 with respect to the 1977 amendments . . . ."); *Stomps v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1533, 1534-35 (11th Cir. 1987); *Southard v. Director, Office of Workers' Compensation Programs*, 732 F.2d 66, 71 (6th Cir. 1984). See also 20 C.F.R. § 718.3(c) (acknowledging this obligation).

<sup>71</sup> See pages 26-27 *supra*.

<sup>72</sup> See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 120 n.17 (1980) (little deference accorded to an administrative interpretation that was "primarily litigation inspired"); *Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*) ("There is some question, to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron*."), *aff'd*, 108 S. Ct. 271 (1987).

momentum generated by initial approval may seriously impair the enforcement of the . . . laws that Congress enacted." *Id.* See also *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983).

These principles are, of course, all the more applicable where, as here, the rationalizations of counsel make no sense and are inconsistent with other regulations promulgated by the agency.<sup>73</sup> It is clear in this case that the Secretary did not and could not have intended the exclusion of miners lacking ten years of mine exposure as a "causation" criterion. The only plausible explanations are (1) that the Secretary adopted this exclusion by mistake, in a regulation that was rushed into place,<sup>74</sup> or (2) that the Department undertook a deliberate effort to narrow the impact of a statutory mandate that it had come to oppose.<sup>75</sup> In either case, the arguments for deference to the Secretary evaporate.<sup>76</sup>

<sup>73</sup> See *Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*) (*Chevron* principle of deference "cannot possibly have application where counsel's interpretation in fact does not explain agency action"), *aff'd*, 108 S. Ct. 271 (1987).

<sup>74</sup> The 1977 Amendments were signed into law on March 1, 1978. The proposed new interim rule was published on April 25, 1978, 43 Fed. Reg. 17765, and interested persons were given only 30 days in which to submit comments, *id.* The new rule was put into effect on August 18, 1978. 43 Fed. Reg. 36818.

<sup>75</sup> By 1977, the Department had reversed its previous position and was seeking the right to promulgate new standards for all claimants, unconstrained by any reference to the Part B standards. See 1977 House Hearings, *supra* note 30, at 243-44 (statement of Donald Elisburg, Asst. Secy. of Labor); Solomons, *supra* note 14, at 889-90.

<sup>76</sup> The private petitioners also argue that even if section 727.203(a) is illegally restrictive, claimants have no right to invoke the more generous criteria of section 410.490 until the Secretary promulgates a new rule. *Br. of Petrs. Pittston Coal Group et al.* at 20 n.30. This argument ignores the fact that Congress created a statutory right to application of criteria at least as generous as those in section 410.490.

## II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE RIGHT OF SEBBEN CLASS MEMBERS TO HAVE THEIR CLAIMS REVIEWED UNDER VALID CRITERIA COULD BE VINDICATED UNDER 28 U.S.C. § 1361.

In addition to mounting an unsuccessful defense of the Secretary's rule, petitioners also argue that only individual claimants with still-pending cases—like the respondents in *Broyles*—have a right to relief based on the illegality of that rule. In their view, the members of the proposed class in *Sebben* are without any remedy even though it is clear that the primary reason for the denial of benefits in many of these cases was the Secretary's decision to promulgate an interim regulation that illegally denied them any real assistance as a result of the 1977 Amendments. This argument, in the particular circumstances of this case, cannot prevail.

### A. The Right At Stake Is Collateral To The Issue Of Eligibility For Benefits And Is Inconsistent With A Requirement Of Exhaustion Of Administrative Remedies.

All of the petitioners' arguments for foreclosing relief for the *Sebben* class members—timeliness, failure to exhaust, and *res judicata*—are premised on the single assertion that these claimants had available, but passed up, an appropriate remedy to redress their illegal exclusion from eligibility to utilize the interim presumption. That remedy is the administrative appeals process incorporated into the statute, culminating in review in a United States court of appeals.<sup>77</sup> Petitioners argue, in essence, that this remedy is exclusive.

In so arguing, however, petitioners ignore the nature of the right at stake here. At least with respect to claimants who had claims denied or pending prior to the effective date of the 1977 Amendments, Congress created

<sup>77</sup> See 30 U.S.C. § 932(a) (incorporating provisions of the Longshore and Harbor Workers' Compensation Act).



a right to *automatic* Secretarial review of the files applying a rebuttable presumption of total disability based on evidence of simple pneumoconiosis and coal-mine causation. 30 U.S.C. § 945(b). Because these claimants were categorically excluded from application of the Secretary's interim presumption, no reviews satisfying the statute ever took place. Instead, the Secretary went through the largely meaningless exercise of reviewing files under the 1972 "permanent" standards. These were standards that not only had already been applied to deny many of the relevant claims, but had been determined by Congress to be unfair and inconsistent with the statute.

Congress's decision to specify a right to *sua sponte* review of files makes this case different from the more usual context where a statute merely creates a substantive right to benefits. *Cf. Heckler v. Ringer*, 466 U.S. 602 (1984). Here, the Secretary was specifically directed to apply revised standards to pending or denied claims without requiring the claimants to do anything whatsoever to trigger these reviews. In such a special context, the Secretary cannot defend against a class action seeking to enforce this duty on the ground that each member of the proposed class should first have exhausted all levels of administrative and judicial review after being informed of the negative results of the Secretary's largely meaningless reviews.

This Court has recognized that, under appropriate circumstances, exhaustion of specific administrative and judicial review mechanisms is not a prerequisite to direct judicial enforcement of a statutory right. *See Bowen v. City of New York*, 106 S. Ct. 2022, 2031 (1986); *Mathews v. Eldridge*, 424 U.S. 319, 330-31 (1976). Under these precedents, a claimant seeking to go directly to Court must show two things. First, the right at stake must be "collateral" to the main issue in the administrative review process—i.e., eligibility for benefits. Second, there must be a risk of irreparable harm caused by de-

ferring enforcement of this collateral right until after exhaustion has occurred.

Thus, in *Mathews v. Eldridge*, the Court allowed a claimant to go directly to court to assert a constitutional right to a pre-deprivation hearing, noting that this collateral right would necessarily be forfeited if its enforcement were delayed until after exhaustion of *post*-deprivation remedies. 424 U.S. at 331. And in *Bowen v. City of New York*, the Court allowed a class of Social Security claimants to redress a denial of a valid first-level review of their level of disability, even though they had not pursued appeals from that first administrative level. It held that the right to have a claim assessed under valid criteria at the first stage was collateral to the issue of benefits, and relied on the fact that mentally disabled persons may suffer irreparable harm merely by virtue of being required to pursue unnecessary administrative appeals. 106 S. Ct. at 2027.

This case falls into the same narrow class of cases where the requirement of exhaustion does not apply. To begin with, the collateral right here—the right to an *automatic* Secretarial review under revised criteria—is both clearer and more specific than the right to a valid first-level disability assessment vindicated in *Bowen*. Congress quite deliberately<sup>78</sup> instructed the Secretary to review *every* pending or denied Part C file and to "approve any such claim *forthwith* if the provisions of this part, as so amended, require that approval."<sup>79</sup> It further instructed the Secretary not to "require any additional medical or other evidence to be submitted if the evidence on file is sufficient for approval of the claim."<sup>80</sup> The legislative history emphasizes repeatedly that claimants

<sup>78</sup> This requirement stands in stark contrast with the provisions of section 945(a)(1), which mandated file reviews by SSA triggered only by *requests* from claimants.

<sup>79</sup> 30 U.S.C. § 945(b)(1) (emphasis added).

<sup>80</sup> *Id.* § 945(b)(2)(A).



were not to be required to do *anything* in order to receive these reviews.<sup>81</sup>

Congress created this unusual requirement because of serious concerns about the Secretary's previous administration of Part C. As noted above, it recognized that the 1972 permanent regulations had led to a multitude of denials of benefits to claimants who were disabled and otherwise eligible within the meaning of the statute. And it also knew that tens of thousands of claimants had been waiting years without any disposition of their claims. As one House staffer put it in 1978, a whole class of miners, who already were suffering "the slow, emaciating violence of disease," had then been inflicted with an "additional and more insidious form of violence, the violence of governmental institutions—that of indifference, inaction, obfuscation, and delay."<sup>82</sup>

In response to this recognition, Congress mandated that affected claimants, having already filed potentially valid claims, not be required to take any further action. In so doing, it was merely accepting the practical reality that many of the claimants, who had already been denied or had been waiting years for some disposition, would not take further steps to renew their claims.

<sup>81</sup> See, e.g., House Conference Report, *supra* note 19, at 21 ("the conference substitute also requires the Secretary of Labor to *automatically* review all currently denied or pending part C claims"), (emphasis added); 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) ("The House bill's provision of automatic review of all denied or pending claims in light of the changes in the law . . . is retained in substance. Every such claimant is absolutely entitled to such a review . . ."). See also 124 Cong. Rec. 6260 (1978) (reprinting a Dept. of Labor description of the 1977 Amendments) ("Any coal miner or dependent survivor whose claim for black lung benefits has been previously denied, or is still pending a decision by the *Department of Labor* (DOL), will have their claim *automatically* reviewed. This review will consider the evidence already in the claim file in light of the 1977 amendments and will be done *without filing a new claim*." ) (all emphasis in original).

<sup>82</sup> McGillicuddy, *supra* note 14, at 1241.

Thus, the decision to mandate "automatic and expedited review" reflected a "strongly held belief . . . that the actions of the administrative agencies, in the past, have been almost as spiritually destructive and crippling of the subjects of this program as has the disease itself."<sup>83</sup>

This description of the nature and origins of the collateral right to Secretarial reviews also serves to demonstrate the irreparable harm that would arise if exhaustion of administrative remedies were deemed a prerequisite to enforcement of the right. First, in principle, a right to *automatic* review—like the right to a predeprivation hearing in *Mathews v. Eldridge*—is irretrievably lost if a claimant is required to go through layers of administrative review to enforce it. At that point, of course, the review is no longer "automatic."

Moreover, for the reasons stated here, the consequences of that loss are far from trivial. Congress created the Secretary's quasi-fiduciary review obligations in order to assure that all claimants would have 1977 Amendments applied to their claims. In light of the previous mishandling of the program, it knew that even a requirement that claimants request a review would lead directly to forfeiture of the right by many claimants. The Secretary, having been given this specially protective duty, in effect forced all claimants lacking ten years of mine exposure to pursue several levels of administrative and judicial review before obtaining the right to a review complying with the statutory standards. Thousands, of course, failed to do so,<sup>84</sup> and are now told by the Government that they will never receive a review complying with the statute. In light of the mandate of section 945, such an outcome simply cannot be countenanced.

<sup>83</sup> *Ibid.*

<sup>84</sup> Prior to the 1977 Amendments, only 11% of initially denied Part C claimants requested hearings before ALJs. Snyder & Solomons, "Black Lung: A Study in Occupational Disease Com-

Petitioners attempt to distinguish *Bowen* on the ground that it involved a *secret* policy of denying valid, first-level disability assessments. It is true that the secret nature of the illegal policy in *Bowen* was a relevant factor because it prevented claimants from knowing about, and seeking to redress, a violation of their rights. But here we have a specific congressional finding that the relevant claimants would not vindicate their rights if forced to *request* reconsideration under the 1977 Amendments. This problem, in turn, was created by the massive mishandling of the program that Congress was seeking to redress. In such a context, the public nature of the Secretary's illegal regulation is not a sufficient reason for distinguishing this case from *Bowen*.

Petitioners also argue that if class members had pursued appeals, they might long ago have received benefits. But the same was true in *Bowen*. Indeed, there, the illegal policy affected only the first level of disability assessment. Claimants could obtain application of valid criteria simply by seeking an ALJ hearing. Here, by contrast, the Secretary's illegal regulation was fully applicable at the ALJ hearing stage, and could only be challenged before the Benefits Review Board or in a court of appeals.

For all of these reasons, it is clear that the *Sebben* class members have a collateral right to a valid review and that enforcement of that right should not be tied in

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pensation" (1976), reprinted in Subcomm. on Labor of the House Comm. on Educ. & Labor, 94th Cong., 2d Sess., Proceedings of the Interdepartmental Workers' Compensation Task Force Conference on Occupational Diseases and Workers' Compensation 799 (Comm. Print 1976). One of the primary reasons was the general absence of legal representation. *Id.* When, years later, these same claimants were informed (1) that their claims had been reviewed by the Secretary under 1977 Amendments, (2) that they were required to prove total disability because they did not have ten years of mine employment, and (3) that their previous files still failed to show such disability, they were hardly likely to preserve their statutory rights by seeking a full hearing before an ALJ.

any way to the timely completion of the administrative and judicial reviews provided by statute. It follows as well that there has been no ruling on *this* right, and that petitioners *res judicata* arguments are therefore entirely misplaced.<sup>85</sup>

Equally misplaced are the efforts of petitioners and *amici* to support their legal arguments with dire predictions of the effects of a ruling in favor of the *Sebben* class. It is, of course, likely that requiring reconsideration of the claims of these miners under legally valid criteria will create some administrative burdens and will increase the costs of the program. However, we note that all parties have been on notice regarding this problem with the interim regulation since at least 1981.<sup>86</sup>

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<sup>85</sup> Two other categories of claimants bear special mention. The Eighth Circuit's definition of the proposed class includes some claimants who filed unsuccessfully under Part B between 1969 and 1973. U.S. Pet. App. 18a. Those Part B claimants whose claims were pending or denied as of the enactment of the 1977 Amendments had a right to request a review by the Secretary of Labor preceded, at their option, by a review by the Secretary of Health and Human Services. See 30 U.S.C. § 945(a). Part B claimants who requested such reviews were affected by the scope of section 727.203(a)(1) and thus were properly included in the class.

The Eighth Circuit also included in the class those Part C claimants who filed after the effective date of the 1977 Amendments and prior to March 31, 1980—the effective date of the new permanent standards. These claimants had a right to assessment under criteria “not . . . more restrictive” than SSA's, 30 U.S.C. § 902(f)(2)(C), but they did not, of course, have a right to a *review* of an *existing* claim under section 945. The question whether these claimants should be excused from exhaustion depends on whether, in the particular circumstances of this case, the Secretary could properly demand such exhaustion in order to avoid application of a flatly illegal regulation. The Eighth Circuit concluded, properly in our view, that the history of repeated congressional reopening of claims denied under unduly restrictive regulations indicates that exhaustion should not be the rule in this special context. U.S. Pet. App. 11a-12a, 16a.

<sup>86</sup> See *Lynn v. Director, Office of Workers' Compensation Programs*, 3 Black Lung Rep. 1-125, at 1-128 (Ben. Rev. Bd. 1981) (Miller, J., dissenting).



Moreover, the Secretarial reviews at issue here can be conducted quite expeditiously.<sup>87</sup> As for the financial predictions offered here, they are largely based on the incorrect assumption that the Labor *rebuttal* provisions would also be eliminated<sup>88</sup> and are, in any event, inconsistent with the views previously stated by the Secretary.<sup>89</sup>

**B. An Action Under 28 U.S.C. § 1361 Was An Appropriate Vehicle For Vindicating This Collateral Right.**

In *Bowen and Heckler*, the jurisdiction of the federal courts was predicated on a specific provision of the Social Security Act, 42 U.S.C. § 405(g), while the time limitations and exhaustion requirements usually applicable under that provision were waived. Here, by contrast, jurisdiction was premised on the general mandamus statute, 28 U.S.C. § 1361. This difference, however, should not affect the outcome.

The selection of section 1361 as a jurisdictional basis in this case reflects the particular features of the Black Lung Benefits Act. First, the specific judicial review provision incorporated in that Act, 33 U.S.C. § 921(c), provides only for appeals to the federal courts of appeals from "final orders" of the Benefits Review Board. Here, there could be no final order of the Board if respondents were to vindicate their right to receive an automatic

<sup>87</sup> The Secretary estimates that she would be required to review 94,000 claims. Br. at 38. In 1980 alone, the Department issued 145,700 determinations on reviewed or newly filed claims. Secy. of Labor, Annual Report to Congress on the Black Lung Program 4 (1980).

<sup>88</sup> See Brief of Amici National Council of Compensation Insurance *et al.* at 9 & n.9; Brief of Petrs. Pittston Coal Group *et al.* at 4 & n.7 (incorporating the estimate of amici).

<sup>89</sup> See Petition for the Secy. of Labor *et al.* in *Sebben* at 12 (interim presumption of disability likely, in most cases, to be rebutted). As noted earlier, most of the potential liability here would be borne by the federal Black Lung Disability Trust Fund.

Secretarial review without being required to exhaust administrative remedies.

In the absence of a specific, applicable review statute, the usual approach would be to seek "non-statutory" review of an administrative action in district court under 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. § 702.<sup>90</sup> Indeed, with only a few exceptions, such a procedure has largely eliminated the need for mandamus actions under section 1361. See 4 K. Davis, *Administrative Law Treatise* § 23.11, at 166. However, under the Federal Coal Mine Safety Act, of which the Black Lung program is a part, the judicial review provisions of the APA are not applicable. 30 U.S.C. § 956. It was therefore probably more appropriate to rely on section 1361.<sup>91</sup>

Numerous courts have recognized that section 1361 can be an appropriate way to vindicate a collateral right like that at issue in *Bowen v. City of New York*.<sup>92</sup> The

<sup>90</sup> See, e.g., *Nader v. Volpe*, 466 F.2d 261, 269 (D.C. Cir. 1972). The possibility of such an action under the Black Lung Benefits Act has been specifically recognized. See *Louisville & Nashville Railroad Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Compensation Dept. of District Five, UMW v. Marshall*, 667 F.2d 336, 343 (3d Cir. 1981).

<sup>91</sup> There is authority for the proposition that a section 1331 suit could have been brought even without the APA. See, e.g., *Olegario v. United States*, 629 F.2d 204, 224 n.9 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981). If so, then the proper course of action would be to affirm the judgment below under this alternate jurisdictional theory. See *Ganem v. Heckler*, 746 F.2d 844, 848-49 (D.C. Cir. 1984).

<sup>92</sup> See, e.g., *Ganem v. Heckler*, 746 F.2d 844, 850-52 (D.C. Cir. 1984); *City of New York v. Heckler*, 742 F.2d 729, 739 (2d Cir. 1984), *aff'd on other grounds sub nom. Bowen v. City of New York*, 476 U.S. 467 (1986); *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 968-69 (8th Cir. 1983); *Kuehner v. Schweiker*, 717 F.2d 813, 819 (3d Cir.), *vacated and remanded on other grounds*, 469 U.S. 977 (1984); *Leschniok v. Heckler*, 713 F.2d 520, 522 (9th Cir. 1983). These cases have arisen under the Social Security Act because of



basic requirements are that the plaintiff show a "clear nondiscretionary duty" for which there is no other appropriate avenue of relief. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). These requirements are clearly satisfied where a claimant establishes (1) the existence of a clear collateral right that cannot await exhaustion without causing irreparable harm, and (2) the absence of another applicable jurisdictional theory. See *Kuehner v. Schweiker*, *supra*, 717 F.2d at 827-28 (Becker, J., concurring) (jurisdictional analysis under *Mathews v. Eldridge* and section 1361 is essentially the same).

Petitioners attempt to suggest that, even if otherwise applicable, the mandamus statute could not apply here because the statutory duty is not sufficiently clear. In essence, they assert that the complexity of the statute, by itself, creates enough "discretion" to insulate the Secretary from mandamus scrutiny. This argument, however, is without substance. If respondents have carried the burden of showing a clear inconsistency between the statute and the regulation within the meaning of *Chevron*, U.S.A., *supra*, then there can be no doubt about the existence of a "clear duty" enforceable through mandamus.<sup>93</sup> To be sure, under *Chevron*, U.S.A., as well as under section 1361, there are occasions when the proper interpretation of a statute requires use of the traditional tools of statutory construction.<sup>94</sup> But the existence of

uncertainty about whether 42 U.S.C. § 405(h) bars all other forms of jurisdiction.

<sup>93</sup> Petitioners cannot dispute the proposition that the Secretary had a separate "clear duty" to conduct reviews under section 945 applying standards conforming with the statute. See 124 Cong. Rec. 3426 (1978) (statement of Rep. Perkins) ("Every such claimant is absolutely entitled to such a review . . .") (emphasis added).

<sup>94</sup> See *Chevron*, U.S.A., 467 U.S. at 843 n.9. ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.") (emphasis added); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930)

such a need for interpretation does not by itself prevent the use of a mandamus remedy, where the interpretive process establishes a clear duty.<sup>95</sup> Here, despite the relative complexity of the statute and regulations, such a duty is clear, and the Secretary has no basis for claiming an exemption from the remedy of mandamus.

## CONCLUSION

For the reasons stated, the decision below should be affirmed.

Respectfully submitted,

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(even if statute "must be read and in a sense construed to ascertain what is required," mandamus may be appropriate); *Ganem v. Heckler*, 746 F.2d 844, 853 (D.C. Cir. 1984) ("The central issue in every mandamus case must be the 'proper interpretation of the particular statute and the congressional purpose.'") (quoting *Work v. United States ex rel. Rives*, 267 U.S. 175, 178 (1925)); *Legal Aid Society v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979), cert. denied, 447 U.S. 921 (1980) ("It is no bar to [mandamus] relief that the court [is] required to interpret [the governing law] to determine the precise scope of the agency's duties.")

<sup>95</sup> The cases cited by petitioners involve situations where the statute was so ambiguous that it would not have met the *Chevron*, U.S.A., standard for overcoming deference to administrative expertise. See, e.g., *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958) (claimant raising "matters of doubtful or highly debatable inference from large or loose statutory terms"); *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 219 (1930) (mandamus inappropriate where statutory duty is not "plainly prescribed" but depends on a doubtful statutory construction.